

MACPHERSON'S  
LAW OF MORTGAGE  
IN  
BRITISH INDIA,

COMPRISING:

PART I.—THE LAW OF MORTGAGE (MORE PARTICULARLY) IN  
BENGAL AND THE N. W. P., APPLICABLE TO  
CASES UNAFFECTED BY THE TRANSFER  
OF PROPERTY ACT, 1882,

AND

PART II.—THE LAW OF MORTGAGE AS CONTAINED IN THE  
TRANSFER OF PROPERTY ACT, 1882.



SEVENTH EDITION.

*Revised and enlarged with all the recent Madras and Bombay decisions.*

BY

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OF THE INNER TEMPLE, BARRISTER-AT-LAW, DEPUTY SECRETARY TO THE GOVERNMENT  
OF INDIA IN THE LEGISLATIVE DEPARTMENT,

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## PREFACE.

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THE present edition of this treatise consists of two parts : the first contains, in a revised shape, the old case law, which alone formed the subject-matter of previous editions ; the second sets out the new law as enacted in the Transfer of Property Act, 1882.

In connection with the new second part, I would remind my readers that the Transfer of Property Act, 1882, came into force on the 1st of July 1882 throughout the whole of British India, except Bombay, the Punjab and British Burma. For mortgages entered into since the 1st of July 1882 in any province in which this Act is in force, the law applicable is to be found in the Transfer of Property Act exclusively, and no reference can in such cases be made to the older law, except for the mere purpose of explanation or argument.

With respect to the retention of the old law in the first part of the present edition, it is to be observed that section 2 of the Transfer of Property Act declares that the Act does not affect "any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability." Therefore as regards all mortgages of a date prior to that on which the Act came into force, it is necessary to possess an accurate knowledge of the old law in order to ascertain what are the rights and liabilities of the parties, and what is the relief to which they are entitled.

A Full Bench of the Allahabad High Court has held that the provisions of the Transfer of Property Act apply to mortgages of the older class, so far as all matters of mere procedure are concerned. If this decision be accepted as sound

law (as to which see *infra*, p. 614), it is at any rate clear that the provisions of the Act are not applicable to a mortgage of the older class, even in a matter of procedure, in any instance in which the application of those provisions would substantially alter or damnify the position of any of the parties.

It may further be noticed that the old law still prevails in Bombay; and it will be seen that the scope of the book has been a good deal extended, so as to embrace all the later reported decisions of the High Courts at Madras and Bombay, bearing on the subject of the law of mortgage.

In conclusion my best thanks are due to my friend, Mr. Henry T. Hyde, of the Calcutta Bar, who has, in addition to passing the whole work through the press and preparing the Index and Table of Cases, rendered me valuable assistance in the revision of some of the later chapters.

J. M. MACPHERSON.

LONDON, *May* 1st, 1885.

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# ABBREVIATIONS.

A. & E.	...	Adolphus and Ellis, King's Bench Reports, 1834—1841. ( <i>English</i> ).
B. & Ald.	...	Barnewall and Alderson, King's Bench Reports, 1817—1822. ( <i>English</i> ).
B. L. R.	...	Bengal Law Reports, 1868—1875.
B. L. R. (F. B. R.)	...	" " Full Bench Rulings,
Beavan	...	Chancery Reports, 1838—1866. ( <i>English</i> ).
Bom. H. C.	...	Bombay High Court Reports, 1862—1875.
Boulnois	...	Calcutta Supreme Court Reports, 1856—1859.
Bourke	...	Calcutta High Court Reports, 1864—1865.
C. L. R.	...	The Calcutta Law Reports, (High Court), 1877—1883.
Cr. M. & R.	...	Crompton, Meeson and Roscoe, Exchequer Reports, 1834—1838. ( <i>English</i> ).
Fulton	...	Calcutta Supreme Court Reports, 1842—1844.
Hare	...	Chancery Reports, 1841—1853. ( <i>English</i> ).
Hay	...	Calcutta High Court Reports, 1862—1863, published by G. C. Hay and Co.
Hyde	...	Calcutta High Court Reports, 1862—1864.
I. L. R. All	...	Indian Law Reports, Allahabad Series, 1875—1885.
" Bom.	...	Do. Bombay Series, " "
" Calc.	...	Do. Calcutta Series, " "
" Mad.	...	Do. Madras Series, " "
Ind. Jur	...	The Indian Jurist, new series, 1866—1867.
L. J. Ch.	...	The Law Journal, Chancery, 1831—1885. ( <i>English</i> ).
L. R. Ch.	...	The Law Reports, ( <i>English</i> ). Chancery Appeal Cases, 1865—1875.
" Ch. D.	...	" Chancery Division, 1876—1885.
" H. L.	...	" English and Irish Appeals, 1865—1875.
" I. A.	...	" Indian Appeals, 1873—1885.
" P. C.	...	" Privy Council Cases, 1866—1875.
Mad. H. C.	...	Madras High Court Reports, 1862—1875.
Marsh.	...	Marshall's Calcutta High Court Reports, 1862—1863.
Merivale	...	Chancery Reports, ( <i>English</i> ), 1815—1817.
Moore's I. A.	...	Moore's Indian Appeal Cases, 1836—1872.
Morton	...	Calcutta Supreme Court Reports, 1774—1841.
Mylne and Craig	...	Chancery Reports, ( <i>English</i> ), 1835—1841.
Mylne and Keen	...	Chancery Reports, ( <i>English</i> ), 1832—1835.
N. W. P. (Agra) H. C.	...	North-West Provinces High Court Reports, (Agra), 1866—1868.
(F. B.)	...	" Full Bench Rulings.
N. W. P. (All.) H. C.	...	North-West Provinces High Court Reports, (Allahabad) 1869—1875.
Rep. Sum. Cases	...	Reports of Summary Cases decided by the Calcutta Sudder Dewanny Adawlut, 1834—1848.
S. D. A.	...	Decisions of the Calcutta Sudder Dewanny Adawlut 1845—1860.
S. D. A. Mad.	...	Decisions of the Madras Sudder Dewanny Adawlut.
S. D. A., N. W. P.	...	Decisions of the Sudder Dewanny Adawlut of the North-West Provinces, 1843—1864.
Sel. Rep.	...	Reports of Select Cases decided in the Calcutta Sudder Dewanny Adawlut from 1791 to 1818.
Simons	...	Reports of Cases in the Courts of the Vice-Chancellors, ( <i>English</i> ), 1829—1854.
Suth. S. C. C.	...	Sutherland's Calcutta Sudder and High Court decisions in References from Mofussil Small Causes Courts, 1861—1865.
Tay. and Bell	...	Taylor and Bell's Calcutta Supreme Court Reports, 1849—1853.
W. R.	...	Sutherland's Weekly Reporter, (Calcutta High Court), 1864—1875.
W. R. Sp.	...	" Special Volume of Reports of Cases (Calcutta Court), July 1862—July 1864.
W. R. 1864	...	" Reports of Cases (Calcutta Court), decided in 1864 prior to commencement of <i>Weekly Reporter</i> .

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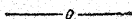
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## ADDENDA.



(*Being notes of cases published while the work was in the Press.*)

### PART I.

- p. 12.—Note (g). See also the remarks on zur-i-peshgi leases by *Kemball, J.* in *Gopal Sitaram Gune v. Desai*, I. L. R., 6 Bom., 674 (*cf.* p. 680.)
- p. 22.—For the various stages of a mortgage which are common to the province of Malabar, see *Kundu v. Impichit*, I. L. R., 7 Mad., 442 (*cf.* pp. 451-452.)
- p. 35.—Note (s). See also *Sridhar Narain v. Atmaram Govind*, I. L. R., 7 Bom., 455, for the duties of a receiver of an insolvent's estate when dealing with mortgaged property.
- p. 38.—Note (b). The ruling of the Privy Council on this point has recently been followed by the Allahabad High Court in *Makundi v. Sarabsukh*, I. L. R., 6 All., 417 (*cf.* p. 419.)
- p. 40.—Note (d). Compare the ruling of the Allahabad High Court in *Makundi v. Sarabsukh*, I. L. R., 6 All., 417.
- p. 46.—Note (e). The rule laid down in these cases has been applied by the Allahabad High Court in the recent case of *Makundi v. Sarabsukh*, I. L. R., 6 All., 417 (*cf.* p. 422.)
- p. 47.—Note (j). See also *Husein Begam v. Zia-ul-nisa Begam*, I. L. R., 6 Bom., 467.
- p. 54.—Note (j). See also *Balvant Santaram v. Babaji*, I. L. R., 8 Bom., 602.
- p. 56.—Note (n). In the case of a voluntary sale by a father, the purchase-money does not constitute an antecedent debt such as to render that sale binding on the sons, unless they prove the transaction to have been immoral,—*Hanuman Kamat v. Dowlat Munder*, I. L. R., 10 Calc., 528. As to the burden of proof when the sons allege that a debt was contracted for immoral purposes, see *Hanuman Singh v. Nanak Chand*, I. L. R., 6 All., 193.
- p. 59.—Note (w). See also the recent decision of the Allahabad Court in *Mahabir Prasad v. Basdeo Singh*, I. L. R., 6 All., 234.
- p. 60.—In *Hardey Narain Sahu v. Ruder Perakash Misser*, I. L. R., 10 Calc., 626 (P. C.); S. C. L. R. 11 I. A., 26, the Privy Council has recently explained and distinguished its decision in *Deendyal's case*. See also *Trimbak Balkrishna v. Narayan Damodar Dabholkar*, I. L. R., 8 Bom., 481, and *Bhikaji Ramchandra Oke v. Yashwantrao Shripat Khopkar*, I. L. R., 8 Bom., 489, in which the above Privy Council case was referred to and followed.
- p. 61.—Note (g). Compare also the remarks of the Court in the more recent case of *Jeo Lal Singh v. Gunga Pershad*, I. L. R., 10 Calc., 996.
- p. 63.—Note (m). See also *Dorasami v. Atiratra*, I. L. R., 7 Mad., 186.

- p. 70.—Note (f). For the Madras law as to the validity of a gift of ancestral estate by an undivided Hindu father, see *Baba v. Timma*, I. L. R., 7 Mad., 357 (F. B.)
- p. 82.—Note (o). The point has, however, now been decided by a Full Bench which has held that the consent of the next reversioner is sufficient—*Nobo Kishore Sarma Roy v. Hari Nath Sarma Roy*, I. L. R., 10 Calc., 1102 (F. B.)
- p. 83.—Note (v). Followed in *Madan Mohan v. Puran Mal*, I. L. R., 6 All., 288.
- p. 89.—Note (p). See also *Madari v. Malki*, I. L. R., 6 All., 428. In *Balgobind v. Ramkumar*, I. L. R., 6 All., 431, a somewhat different view is propounded in the judgment of *Mahmood*, J.,
- p. 91.—Note (v). See also *Ram Piyari v. Mulchand*, I. L. R., 7 All., 114.
- p. 99.—Note (v). See also *Soorja Koer v. Nath Buksh Singh*, I. L. R., 11 Calc., 102.
- p. 110.—Note (o). See *Nath Ram v. Phulchand*, I. L. R., 6 All., 581 where an oral mortgage unaccompanied by possession was defeated by a subsequent registered sale certificate.
- p. 120.—Note (f). So in the more recent case of *Modun Mohun Chowdhry v. Ashad Ally Beparee*, I. L. R., 10 Calc., 68, a transaction which appeared on its face to be an absolute sale was held to be shown by the acts and conduct of the parties to be really a mortgage.
- p. 126.—Note (v). See also the more recent Full Bench decision in *Bhajan v. Mushtak Ahmad*, I. L. R., 5 All., 324 (F. B.), in which the Full Bench case of *Ram Saran Lal v. Amirta Kuar* was discussed and distinguished.
- p. 169.—In the recent case of *Ajit Singh v. Bijai Bahadur Singh*, I. L. R., 11 Calc., 61 (P. C.), where instruments of mortgage and sale were cancelled on proof of fraud and collusion between the grantee, who had advanced money, and the manager of the grantor's estate, the grantor having been unduly influenced in the transaction, it was held by the Privy Council that the condition of cancellation should be, not the repayment of all money received by the manager, but only of sums shown to have been paid to the grantor personally, and of such sums received by the manager as he would have been justified in borrowing in the course of a prudent management of the estate.
- p. 188.—Note (m). The effect of the decision of the Full Bench in the case referred to in this note has recently been explained to be that, although the mere fact of possession having been taken by a purchaser under an unregistered conveyance is insufficient, of itself, to establish a good title to a property as against a subsequent registered purchaser, and is not conclusive evidence of notice as against him, yet, in the majority of cases, such possession is very cogent evidence of notice. *Nani Bibee v. Hafizullah*, I. L. R., 10 Calc., 1073.
- p. 193.—Note (e). The principle of the Bombay Full Bench case referred to in this note has been followed by the Madras High Court in a recent decision in which the question was whether a subsequent registered certificate of sale accompanied by possession had priority over a prior unregistered mortgage, the registration of which was optional. *Ramaraja v. Arunachala*, I. L. R., 7 Mad., 248.
- p. 198.—Note (v). Followed in the more recent case of *Imdad Husain v. Tasadduk Husain*, I. L. R., 6 All., 335.

- p. 213.—Note (i). See also the more recent Bombay case of *Nago Kanakurua v. Babaji Katari*, I. L. R., 8 Bom., 610, where the parties had not stated the money value of the consideration in the deed of assignment.
- p. 253.—Note (o). Another Full Bench of the Madras High Court has recently reconsidered and reaffirmed the ruling referred to in this note, *Reference under the Stamp Act*, sec. 46, I. L. R., 7 Mad., 421.
- p. 258.—It may be noticed that the Act does not provide for the levy of any penalty in the case of lost documents. *Sennandan v. Kollakiran*, I. L. R., 2 Mad., 208. Therefore where in a suit to redeem a mortgage of 1833, executed upon an unstamped *cadjan* liable to stamp duty under Mad. Reg. XIII of 1816, secondary evidence of the contents of the document was tendered on payment of a penalty, it was held that the evidence could not be admitted. *Kopasan v. Shamu*, I. L. R., 7 Mad., 440.
- p. 259.—Note (i). The law does not, however, require intention to be proved as part of the offence. *Queen Empress v. Palani*, I. L. R., 7 Mad., 537.
- p. 283.—Note (x). A Malabar *jemmi* (mortgagor) may, however, set off arrears of rent due to him by the *kanam*-holder (mortgagee) against the latter's claim for compensation for improvements, even when the *kanam*-holder has pledged his rights to a third party. See *Achuta v. Kali*, I. L. R., 7 Mad., 545.
- p. 298.—Note (g). But a renewal of a mortgage already existing on the property prior to attachment, which does not enhance the charge, is not an alienation within the meaning of sec. 276 of the Code of Civil Procedure. *Mahadevappa v. Srinivasa Rau*, I. L. R., 4 Mad., 417.
- p. 306.—Note (m). See also *Jhabbu Ram v. Girdhari Singh*, I. L. R., 6 All., 298.
- p. 307.—Note (g). See also *Baghelin v. Mathura Prasad*, I. L. R., 4 All., 430.
- p. 314.—Note (j). The latest decision is that of the Privy Council in *Gokaldas Gopaldas v. Puranmal Prensukhdas*, I. L. R., 10 Calc., 1035, (P. C.) where the whole subject was discussed at length, and the conclusion was come to that the ruling in *Toulmin v. Steere* should not be extended to India, where the question to ask in every case should be, what was the intention of the party paying off the charges.
- p. 343.—Note (s). See also *Vithal Nilkanth Pinjale v. Vishvasrao*, I. L. R., 8 Bom., 497.
- p. 365.—Note (z). See also the recent case of *Periandi v. Angappa*, I. L. R., 7 Mad., 423.
- p. 413.—Note (n). The decision of the Bombay Full Bench in *Lallubhai v. Naran* has, however, still more recently been followed and approved by a Division Bench of the Allahabad Court in *Muhamamad Zaki v. Chatku*, I. L. R., 7 All., 120.
- p. 416.—Note (z). It has recently been held by a Full Bench of the Allahabad High Court that a suit upon a bond for money payable on demand, by which immoveable property is hypothecated as security for the debt, wherein the relief prayed is recovery of the amount with interest by establishment of the right to enforce the hypothecation by auction sale of the interest of the obligor in such property, is governed by this article and not by Art. 132



of the Limitation Act of 1877, *Shib Lal v. Ganga Prasad*, I. L. R., 6 All., 551 (F. B.)

- p. 418.—Note (c). But when the deed of mortgage is required to be, but is not registered, such receipt cannot be deemed to be a payment for the purposes of sec. 20 of the Limitation Act. *Pichandi v. Kandasami*, I. L. R., 7 Mad., 539.
- p. 454.—Note (x). See, however, the recent case of *Nanjundepa and Guruslingapa v. Hemapa*, I. L. R., 9 Bom., 10, where it was held that when a purchaser of the equity of redemption had not yet either got possession or obtained a certificate of sale where the sale took place under the decree on the mortgage, it was not necessary for the mortgagee to make him a party to his suit against the mortgagor.
- p. 507.—Note (y). See also *Madhopersad v. Gajudhar*, I. L. R., 11 Calc., 111 (P. C.)
- p. 524.—Note (e). See also the recent decision of the Allahabad High Court in *Makhan Kuar v. Jasoda Kuar*, I. L. R., 6 All., 399.

## PART II.

- p. 643.—Sec. 52. *B* held a decree for the sale of property which had been mortgaged to him by an instrument which was not compulsorily registrable and was not registered. *N* purchased the same property *pendente lite* by a registered deed of sale. It was held that there was here no competition between a registered and an unregistered instrument to which sec. 50 of the Registration Act could apply : and that *N*'s purchase was under this section subject to the decree passed in *B*'s favour. *Bhagwan Das v. Nathu Singh*, I. L. R., 6 All., 444.
- p. 651.—Sec. 58 (b). For a discussion of the definition of "simple mortgage" contained in this section, see the judgments in the very recent case of *Sheoratan Kuar v. Mahipal Kuar*, I. L. R., 7 All., 258 (F. B.)
- p. 695.—Sec. 88. An application for execution of a decree for sale of mortgaged property passed under this section, which directed that if the decree were not satisfied within two months the property should be sold, ought not to be allowed before the expiration of the period provided by the decree. *Har Dayal v. Chadami Lal*, I. L. R., 7 All., 194.

# CORRIGENDA.

—o—

- Page 5, line 6. For "Mindus," read "Hindus."
- " 9, footnote (f). For "Regulation I," read "Regulation V."
- " 49, footnote (p), line 3. For (Ap.), read (Part VII).
- " 80, line 29. For "preferance," read "preference."
- " 82, line 13. For "There does not appear to any," read "There does not appear to be any."
- " 99, footnote (x), line 3. After "N. W. P." insert (All).
- " 101, footnote (d). After "N. W. P." insert (All).
- " 121, footnote (l). After "I. L. R." insert "6 Calc."
- " 199, line 5. For "covenant," read "covenant."
- " 205, line 16. For "Act XIV," read "Act XVI."
- " 219, line 12. For "regarded, cases may, etc.," read "regarded. Cases may, etc."
- " 222, line 10. For "nsufructuary," read "usufructuary."
- " 224, footnote (h). For "Act III of 1879," read "Act III of 1877."
- " 231, line 22. For "condsiation," read "consideration."
- " 248, footnote (p). For "Act I of 1878," read "Act I of 1879."
- " 265, line 5. For "was tendered," read "were tendered."
- " 302, footnote (b). For "6 Calc. 595," read "6 Calc., 559."
- " 325, line 1. For "decree proceeded," read "decree have proceeded."
- " 378, line 27. For "considerd," read "considered."
- " 392, footnote (y). For "p. 60" read, "sec. 60."
- " 414, line 22. For "Act 1871" read, "Act of 1871."
- " 416, footnote (x). For "Art XIV," read "Act XIV."
- " 418, line 19. For "alterations," read "alteration."
- " 426, footnote (c). For "Art. I of 1877," read "Act I of 1877."
- " 442, line 19. For "mortgagor," read "mortgagors."
- " 443, line 2. For "of," read "by."
- " 444, line 17. For "this and lines 18 and 19, read, "Though an usufructuary mortgagee cannot, even when the mortgagor, who did not hypothecate the property as security for the mortgage money, has failed to, etc.""
- " 448, line 2. For "mortgagees," read "mortgagors."
- " 473, line 1. For "obligor," read "obligee."
- " 473, footnote (q), line 1. After 1882 insert the words "sec. 99."
- " 510, line 12. For "mortgagor" read "mortgagee."
- " 521, line 3. For "insufficient," read "insufficient."
- " 524, last line For "preaent," read "prevent."
- " 574, line 17. For "usufructury," read "usufructuary."
- " 584, line 8. For "mofossil, read mofussil."
- " 693, note (7), line 6. For "Bombay," read "Bengal."

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PART I.

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THE LAW OF MORTGAGE,

*More particularly*

IN

BENGAL AND THE N. W. P.,

APPLICABLE TO

CASES UNAFFECTED BY

*THE TRANSFER OF PROPERTY ACT, 1882.*

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## INTRODUCTORY CHAPTER.

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A MORTGAGE may be defined as a pledge, for securing a debt, of lands of which the debtor and those claiming under him remain either the actual owners, or in a position to assert their rights as actual owners, until debarred by judicial sentence or by legislative enactment (*a*). Mortgages of land have long been in use all over India and are well known in Hindu and Mahomedan law.

The Mahomedan law made no distinction between mortgages of land and pledges of other property (*b*). Possession or seisin of the thing pledged was in all cases the essence of the security: and hypothecation, the giving a lien over a thing without actual possession of it, seems to have been originally unknown. All that was required in order to give validity to the contract was, that possession should be once given so as to evidence the fact of the mortgage having been made. And a mortgage did not come to an end on the mortgagee's going out of possession, if he did not do so with the intention of relinquishing his security (*c*): nor was the right of a mortgagee who had obtained possession, injured by his being subsequently ousted by the mortgagor. Although possession was necessary in order to complete the mortgagee's title, it seems that he was not entitled to the use, or to the actual enjoyment of the profits of the property pledged, except by special agreement (*d*).

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(*a*) *cf.* The Transfer of Property Act (Act IV of 1882) s. 58 cl. (*a*).

(*b*) Macnaghten's Mahomedan Law, p. 74.

(*c*) *Ibid.* p. 354.

(*d*) *Ibid.* p. 74.

A mortgagee or pledgee in possession had priority over other creditors with respect to the property pledged, and was entitled to satisfy his debt thereout, before it could be applied to the liquidation of other claims: the surplus only which remained after discharging the mortgage debt being divisible among other creditors (*e*).

The taking of interest was forbidden among Mahomedans, but the property pledged was always presumed to be in value equivalent to the debt due; and the mortgagee might in fact thus obtain, so long as he kept it in his own hands, what was of greater value than the sum lent (*f*).

The mortgagee could not, except with the consent of the mortgagor, at any time sell the property in pledge; at least, if he sold it for more than the principal due upon the loan, he had to account to the mortgagor for what he received in excess of that sum (*g*).

The mortgagor could not dispose of the property mortgaged without the consent of the mortgagee. Such a sale was legally valid, but its operation depended entirely on the pleasure of the mortgagee, unless the purchaser paid off the mortgage debt, which he was entitled to do, or the mortgage was from some other source redeemed (*h*). But the consent of the mortgagee confirmed any such disposition, so that if the mortgagor sold to two persons in succession, and the mortgagee recognised the second sale only, that sale took priority over the first (*i*).

No partial payment of the mortgage debt affected the mortgagee's right over the whole property pledged: and the mortgage remained in force, not only until redemption,

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(*e*) Macnaghten's Mahomedan Law, pp. 75, 347.

(*f*) *Ibid.* p. 74.

(*g*) *Ibid.* p. 74.

(*h*) *Ibid.* p. 176.

(*i*) *Ibid.* p. 355.



but until the mortgagee in consequence of the redemption actually gave possession of the property to the mortgagor (*j*).

The Hindu law likewise recognised no distinction between mortgages of land and pledges of other property (*k*), and the pledge might be for a limited or for an unlimited time, and either usufructuary or for custody only. Actual possession was probably originally (*l*) essential to their validity, but there is little doubt that hypothecation has existed in the country from a remote period (*m*). When no date was specified for redemption, a mortgage might be redeemed at any distance of time, no title by prescription being acquired by the mortgagee in possession (*n*).

A mortgagee in possession had priority over all other mortgagees, if he obtained possession without force or fraud (*o*). The offence of one who, having mortgaged his property, afterwards fraudulently made a mortgage of it to another, was looked upon as a crime worthy of "whipping," "punishment for theft," "punishment as a robber," and even death (*p*).

Although these were the general principles which regulated mortgages amongst Hindus and Mahomedans, many changes and modifications appear to have been from time to time introduced; and there is much inconsistency in the various doctrines laid down in the books. In Hindu law there are numerous written texts in which possession is declared to be absolutely necessary in order to give validity to a contract

(*j*) Macnaghten's Mahomedan Law, p. 356.

(*k*) Colebrooke's Digest, v. 1, chap. 3, Tit. "Pledge," p. 140.

(*l*) *Ibid.* pp. 140—202.

(*m*) Strange's Hindu Law, v. 1, p. 288.

(*n*) Colebrooke's Digest, v. 1, p. 183: Strange's Hindu Law, v. 1, p. 290.

(*o*) Colebrooke's Digest, v. 1, p. 211.

(*p*) *Ibid.* pp. 209, 210.

of mortgage : as for example,—“ By the acceptance or actual possession of a pledge, the validity of the contract is maintained” (q). “ Pledges are declared to be of two sorts, immoveable and moveable, and both are valid when there is actual enjoyment, and not otherwise” (r). On the other hand there are texts, although they are fewer in number and perhaps of less authority, some of them partially, others of them absolutely in opposition to these :—“ Of him who does not enjoy a pledge, nor possess it, nor claim it on evidence, the written contract for that pledge is nugatory, like a bond when the debtor and witnesses have deceased” (s). “ But if there be no occupaney, but a writing exist duly attested and so forth, the writing shall prevail, because it is the best evidence of a transaction : it shall establish the mortgage” (t). It is evident that the original doctrine had been considerably modified, and that, whatever may have been the case at first, a valid mortgage unaccompanied by possession, was a thing in later times not unknown in the Hindu law.

A strong argument in favor of the conclusion that possession is not demanded by either the Hindu or the Mahomedan law as we found them existing in this country, may be drawn from the fact that all the legislation of the English Government on the subject has proceeded on the basis that mortgages are alike valid whether accompanied by possession or not. The earlier legislation of the East India Company did not profess to introduce new principles of law into the country, but rather to express and provide a better mode of enforcing those which already prevailed. The Regulations then enacted may therefore, so far as

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(q) Colebrooke's Digest, v. 1, p. 161. Yajnyawalkya.

(r) *Ibid.* p. 205. Vayasa.

(s) *Ibid.* p. 205. Vrihaspati.

(t) *Ibid.* p. 215. Helayudha.

regards general principles, be presumed to be an embodiment of the law which was found prevailing: and as they in no degree recognise any necessity for the mortgagee's being put in possession, it may reasonably be inferred that according to the law of the land no such necessity existed, either among Hindus or Mahomedans.

One learned writer on Hindu law, Sir Thomas Strange, adopting apparently a suggestion made by Sir William Jones, goes even so far as to think, that notwithstanding all that is said about the necessity of the delivery of possession in order to give validity to a mortgage, it is not unlikely that the mode of pledging without giving possession,—*i.e.* hypothecation,—originated among the Hindus (*u*).

The question as to the necessity for the delivery of possession (which the regulations put beyond doubt in the Bengal Mofussil Courts) was on several occasions raised and discussed in the late Supreme Court under the Statute (*v*) which enacts that in hearing and determining actions or suits between Mahomedans or between Hindus, all matters of contract and dealing between party and party shall be determined, in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Hindus by the laws and usages of Hindus: and when only one of the parties shall be a Hindu or Mahomedan, by the laws and usages of the defendant. At one time it was held that a mortgage between Hindus was invalid, where there had been no possession (*w*). But these cases were overruled, and the Court always subsequently recognised the validity of, and gave full effect to Hindu mortgages, whether accompanied by possession or not (*x*).

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(*u*) Strange's Hindu Law v. 1, p. 288.

(*v*) 21 Geo. 3, Chap. 70, sec. 17.

(*w*) *Sibnarain Ghose v. Russickchunder Neoghy*, Morton's Rep. 105.

(*x*) *Collydoss Gungopadhia v. Sibchunder Mullick*, Morton's Rep. 111: *Sibchunder Ghose v. Russick Chunder Neoghy*, Fulton's Rep. 36.

In Madras it has been decided that an instrument hypothecating land, but unaccompanied with possession, creates a lien upon the land which may be enforced against a subsequent purchaser for value without notice (y).

In Bombay the doubts which formerly existed owing to the numerous and varied decisions on the point, have recently been set at rest by two Full Bench rulings, in which all the previous cases were reviewed (z). The result of these two rulings appears to be that, though it may be laid down as a general, but not as an invariable rule in the Bombay Presidency that possession in the grantee or assignee is

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And see as to the general question of necessity for possession in the case of alienations under the Hindu Law, *Raja Sahib Perhlad Sein v. Baboo Budhoo Sing*, 12 Moore's I. A. 275, S. C. 2 B. L. R. (P. C.) 111; *Ranee Bhobosoondree Dasseah v. Issur Chunder Dutt*, 11 B. L. R. 36; *Gungahurry Nundee v. Raghubram Nundee*, 14 B. L. R. 307; *Lokenath Ghose v. Jugobundhoo Roy*, I. L. R. 1 Calc. 297; *Dinonath Ghose v. Auluck Moni Dabee*, I. L. R. 7 Calc. 753; *Narain Chunder Chuckerbutty v. Dataram Roy*, I. L. R. 8 Calc. 597; *Vasudeva Bhatlu v. Narasamma*, I. L. R. 5 Mad. 6; *Ramasami Ayyangar v. Marimuthu Bhattan*, I. L. R. 6 Mad. 404; *Lalubhai Surchand v. Bai Amrit*, I. L. R. 2 Bom. 299; *Lakshmandas Sarupchand v. Dasrat*, I. L. R. 6 Bom. 168; *Bai Suraj v. Dulpatram Dayashankar*, I. L. R. 6 Bom. 380; *Vasudev Hari Patvardhan v. Tatia Narayan*, I. L. R. 6 Bom. 387; *Vasudev Bhut v. Narayan Daji Damle*, I. L. R. 7 Bom. 131; *Bai Kushal v. Lakhma Mana*, I. L. R. 7 Bom. 452.

(y) *Varden Seth Sam v. Luckpathy Royjee Lallah*, 9 Moore's I. A. 303; *Ohetti Gaundan v. Sundaram Pillai*, 2 Mad. H. C. 51; *Kadarsa Rautan v. Raviiah Bibi*, 2 Mad. H. C. 108; *Golla Chinna Guruvuppa Naidu v. Kali Appiah Naidu*, 4 Mad. H. C. 434; *Sadagopa Chariyar v. Ruthna Mudali*, 5 Mad. H. C. 457. It may be noted that in these cases "justice, equity and good conscience" rather than the Hindu Law, as such, would seem to have formed the rule of decision. See Mad. Reg. II. of 1802, sec. 17, re-enacted in Act III. of 1873, s. 16, cl. (c.)

(z) *Lakshmandas Sarupchand v. Dasrat*, I. L. R. 6 Bom. 168; and *Sobhagchand Gulabchand v. Bhaichand*, I. L. R. 6 Bom. 193. See also *Bapuji Balal v. Satyabhamabai*, I. L. R. 6 Bom. 490; and *Naran Purshotam v. Dolatram Virchand*, I. L. R. 6 Bom. 538.

deemed essential amongst Hindus and Mahomedans to the complete transfer of immoveable property either by gift, sale or mortgage, yet *san* mortgages in Gujerat, and when the first mortgagee is in possession, second mortgages of every kind everywhere, are valid without transfer of possession, whilst in the case of all other mortgages transfer of possession is only necessary in order to make them valid as against subsequent purchasers for value and without notice. It was further ruled that registration is equivalent to notice to all persons purchasing subsequent to the date of such registration, and that, as the main ground of the rule of Hindu and Mahomedan law as to the necessity for transfer of possession was that possession is notice to all subsequent intending mortgagees or purchasers of the title of the party in possession, registration is equivalent to possession, when the registration of the instrument earlier in date has been effected prior to the execution of the instrument set up against it.

The forms in which mortgage securities were given seem to have been the same as those now in use: and the earlier Regulations shew that the usufructuary mortgage and the mortgage by conditional sale, were of common occurrence prior to their enactment.

The law which now governs mortgages in the Mofussil Courts of Bengal and the N. W. P., in cases to which the provisions of the Transfer of Property Act 1882 do not apply, is to be found in the Regulations, and in the decisions of the Courts: and bare questions of Hindu or Mahomedan law rarely if ever arise (a). The law on the subject all bears date since the year 1780, when the legislature seems first to have interfered in the matter indirectly by an Act limiting the amount of interest which the lender

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(a) *Sheikh Mokeem Sircar v. Turee Bibi*, S. D. A. 1848, p. 530: *Hoossein Buksh Khan v. Zuhoor Hoossein*, S. D. A. N. W. P. 1852 p. 88.

of money might legally receive. One form of mortgage, which before that time was much in vogue, was of a very simple nature. The lender received from the borrower a piece of land, receiving the profits in lieu of interest, and retaining possession until the loan was paid off by the mortgagor; the risk of loss in bad years was set off against the profits of good years; no question arose as to the precise sum received by the mortgagee, who was not bound to render any account: and the mortgagor was personally liable for the payment of the principal, but not for any thing further. The Regulation above referred to however, and subsequent enactments (b), changed the character of such securities, and introduced a close system of accounting, applicable to all mortgages made before Act XXVIII of 1855 came into force. They declared that no more than 12 per cent. per annum should be allowed as interest on any mortgage; that all sums received by the mortgagee in excess of 12 per cent. should go to the account of principal; and that whenever he had received a sum amounting to the principal with legal interest, the mortgage should be considered as cancelled and redeemed. In legislating on the subject of mortgages, the Government has for the most part been guided by a desire to protect the debtor against his creditor, and acting on this principle, the Regulations do not sanction in any case the transfer of immoveable property in satisfaction of a debt, without the intervention of a public officer,—unless such transfer be by the direct and immediate act of the proprietor himself (c).

In the Presidency of Madras also similar rules regulating the rate of interest and providing for the adjustment of

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(b) Ben. Reg. XV. 1793, sec. 10: Ben. Reg. XXXIV. 1803, sec. 9: Ben. Reg. XVII. 1806, sec. 6.

(c) *Bhuwanee Churn Mitr v. Jykishen Mitr*, S. D. A. 1847, p. 354: *Lyons v. Skinner*, S. D. A. N. W. P. 1853, p. 447.

accounts were prescribed by the Legislature (*d*) and remained in force until repealed by Act XXVIII of 1855.

In Bombay, however, the enactment which limited the rate of interest which the lender of money might legally receive (*e*) was repealed in the year 1827, when it was enacted that the lawful rate of interest was such rate as was agreed upon between the parties or as was demandable by usage (*f*). The same Regulation further provided (*g*) that in the absence of other agreement, the mortgaged property should, when in the possession of the mortgagee, constitute his sole security for the debt, any profit yielded by the property being considered as equivalent for the interest, and that in the absence of other agreement or recognized law or usage to the contrary either party might at any time, by instituting a civil suit, cause the property to be applied to the liquidation of the debt.

But there are no provisions either in the Madras or Bombay Code, dealing with the redemption and foreclosure of mortgages by conditional sale of the nature of those to be found in the Bengal Regulations (*h*).

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(*d*) Mad. Reg. XXXIV of 1802, and Mad. Reg. II of 1825, s. 7.

(*e*) Bom. Reg. I of 1814.

(*f*) Bom. Reg. I of 1827, s. 10.

(*g*) Sec. 15.

(*h*) Ben. Regs. I of 1798 and XVII of 1806.



## CHAPTER II.

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### OF THE VARIOUS KINDS OF MORTGAGES.

THERE are various kinds of mortgages now in use throughout British India, each kind being attended with rights and liabilities peculiar to itself. In one, the regular payment of the interest of the money advanced is well secured to the mortgagee, while the principal is not recoverable at any fixed period, nor in one sum, but is only gradually to be liquidated from what is received from the land by the mortgagee, in excess of the interest he is entitled to, the mortgagor not being personally liable for the re-payment of either principal or interest. In another, the lien or charge which the mortgagee has on the property, gives him no security for the regular payment of interest, but the mortgagor is personally liable for that and for the principal, which are, after a certain time, recoverable in one sum, either from the mortgagor or from the mortgaged property, the latter being liable to be sold, and the proceeds of its sale being applicable in the first instance towards the liquidation of the mortgage debt. In a third, there is no security for the regular payment of interest, nor is the mortgagor personally liable for that or for the principal, but on default being made the whole property passes away from the mortgagor, and vests absolutely in the mortgagee.

Whatever may be the form adopted, the mortgage is subject to the incidents attached by law to that form: and this, it would seem, notwithstanding any stipulations to

the contrary, which the parties may have made between themselves (a).

There are five different kinds of mortgages. Three of these are simple and pure forms, wholly distinct from each other in their nature and properties (b). The others are merely combinations of the simple forms, and are governed by the rules laid down as to these forms, according as the particular matter in question belongs rather to one form than to another.

The three pure forms are (c),—*the usufructuary mortgage*—*the simple mortgage*—*the mortgage by conditional sale*, *kutkubala*, or *by-bil-wufa*.

I. *The usufructuary mortgage (d)*—Where a man borrows money and gives up his land to the lender, who (unless his debt is paid off by the mortgagor) may retain possession until he has, from the rents and profits of the land, repaid himself the interest, or according as the terms of the agreement in each case may be, the principal and interest of the sum advanced by him (e). Mortgages of this kind correspond with the original *vivum vadium* or the Welsh mortgage known in English law,—where there is no contract express or implied between the parties for the repayment of the money, and the mortgagee cannot foreclose or sue for the money though the mortgagor or his representatives

(a) *Budreenurain v. Oodho Singh*, S. D. A. N. W. P. 1853, p. 161.

(b) *Bhuwanee Churn Mitr v. Jykishen Mitr*, S. D. A. 1847, p. 354; *Lyons v. Skinner*, S. D. A. N. W. P. 1853, p. 447.

(c) *Bhuwanee Churn Mitr v. Jykishen Mitr*, S. D. A. 1847, p. 354 (cf. p. 362).

(d) The descriptions given in the following pages relate more specially to the forms in common use in Bengal and the N. W. P., and cannot therefore be taken to be more than generally applicable to the corresponding forms in the Presidencies of Madras and Bombay.

(e) cf. The Transfer of Property Act (Act IV of 1882) s. 58 cl. (d).

may redeem at any time; the possession of the mortgagee being of the very essence of such a mortgage (*f*).

Of usufructuary mortgages there are two sorts in common use, namely mortgages of the whole right and estate of the mortgagor, and mortgages of his right and estate for a term of years only, that is to say by way of lease.

Zur-i-peshgee leases, or leases granted on a sum of money being advanced, are on the same footing as pure usufructuary mortgages, and are dealt with as such; but this is only when there is a power of redemption reserved to the lessor either expressly or impliedly, so that it distinctly appears that the parties themselves in fact intended the transaction to be in the nature of a mortgage (*g*). Thus a lease at a yearly rent of 214 rupees, from which a deduction of 111 rupees was to be made on account of interest, and in which it was stipulated that "if on the expiration of the lease the loan should not be repaid, the lease should continue," was held to be a zur-i-peshgee lease to be dealt with as a mortgage (*h*).

When a mortgage is given by way of lease, the loan is

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(*g*) Coote on Mortgages, 4th Ed. p. 5: and see Fisher on Mortgages, 3rd Ed., pp. 5, 11. A "bhogbundhuk" is a mortgage with possession, in which the thing pledged is considered an equivalent for interest. *Gopaljee v. Bhuwaneenath Jogee*, S. D. A. N. W. P. 1855., p. 341; *Ishan Chunder v. Sooja Bebee*, 15 W. R. 331; *B. Dorappa v. Kundukuri Mallikarjunudu*, 3 Mad. H. C. 363 (*cf.* p. 365).

(*g*) *Sreemunth Lall Panjah v. Oodoychand Dey*, S. D. A. 1855, p. 481; *Kirparam v. Mouzuma Beebee*, S. D. A. N. W. P. 1853, p. 356; *Sheikh Ubbas v. Sheikh Sahib Ulee*, S. D. A. N. W. P. 1855, p. 355; *Baboo Koonwur Singh Bahadoor v. Doollun Umrieth Koonwur*, S. D. A. 1857, p. 1232; *Et passim*. See also *Basant Lal v. Tapeswari Rai*, I. L. R., 3 All. 1, where this definition is quoted approvingly by the Court.

(*h*) *Kishto Coomer Singh v. Chowdree Beeraj Singh*, 2 Hay, 159; *B. Dorappa v. Kundukuri Mallikarjunudu*, 3 Mad. H. C. 363; *Ma-shook Ameen Suzzada v. Marem Reddy*, 8 Mad. H. C. 31.

generally made re-payable on the same day that the lease expires, the deed containing a stipulation that if default is made, the lender and lessee shall continue in possession on the terms of the lease, until the debt is repaid from the profits of the land or otherwise.

If by the terms of the contract, the mortgagee is to look to the usufruct of the land for the payment of both principal and interest, the mortgagor is not personally liable for the payment of either, in the absence of a special agreement that he shall be so. And it would seem to have been held that even where the application of the profits was expressly limited to the liquidation of interest, the mortgagor was not personally liable for the principal. There is little doubt, however, but that in this last case the mortgagor is liable for the principal, especially if the contract was made subsequent to the passing of Act XXVIII of 1855 (*i*).

The mortgagor has the right of redemption on liquidation of the debt, either from the usufruct, or by a cash payment or deposit in Court (*j*).

Before Act XIV of 1859 came into operation the usufructuary mortgagee never could become absolute owner of the mortgaged estate, and the right of redemption remained to the mortgagor and his representatives after any lapse of time, however great. But by section 1, clause 15 of that Act, the period of limitation to suits against a mortgagee of immoveable property, for recovery of the same, was declared to be sixty years. The provisions of Act XIV of 1859 are in substance similar to those of Act IX of 1871, Sch. 2, Art. 148, under which such a suit is barred unless brought within sixty years from the date of the mortgage save

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(*i*) *Pohpee v. Cheda Lall*, S. D. A. N. W. P. 1848, p. 211; *Sheikh Moohummud Ali v. Kasi Ram*, 1 Sel. Rep. (*n. ed.*) 119. (*cf.* p. 121 *foot note*).

(*j*) *Bhuwanee Churn Mitr v. Jykishen Mitr*, S. D. A. 1847, p. 354. See also *post* Ch. VIII.

where an acknowledgment of the title of the mortgagor or of his right of redemption has before the expiration of the prescribed period (of sixty years) been made in writing signed by the mortgagee or some person claiming under him,—and in such case, within sixty years from the date of the acknowledgment.

Under the present law the period of limitation is the same, but it begins to run from the time when the right to redeem or to recover possession accrues (*k*).

II. *The simple mortgage*.—Where the borrower binding himself personally for the re-payment of a loan with interest, pledges his land as a collateral security for such re-payment. (*l*).

He does not give up possession of the property to the mortgagee, or permit him to enjoy the usufruct of it, nor does he covenant to make an absolute transfer of it in the event of non-payment. On default, the mortgaged estate does not at once pass into the hands of the mortgagee, nor does it of necessity do so at all. The mortgagee enforces his security by suing the mortgagor for what is due as principal and interest, and for a declaration that he has a lien or charge on the land for the debt, and that he has a right to enforce it by sale of the property (*m*). Having obtained a decree, he proceeds in execution to sell the land, and out of the proceeds of the sale to satisfy his claim, the mortgagor being entitled to any surplus which may remain. The mortgagee may himself be the purchaser if he chooses (*n*). From the date on which the money advanced is in the agreement declared to be repayable, up

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(*k*) Act XV of 1877, Sch. II Art. 148.

(*l*) *cf.* The Transfer of Property Act (Act IV of 1882) s. 58 cl. (*b*.)

(*m*) "The most essential of the elements which constitute the simple mortgage is the right to cause the property to be sold—a right without which the transaction, whatever else it may be, certainly cannot be called hypothecation, pledge or simple mortgage." *Per* Mahmood, J. in *Gopal Pandey v. Parsotam Das*, I. L. R. 5 All., 131 (cf. p. 138).

to the time of decree and sale, the mortgagor has the right of redeeming on payment of the balance due in respect of principal and interest: that right, however, necessarily becomes extinct on a sale taking place.

The mortgagor in the case of simple mortgages is liable to lose his land, but it does not thereupon vest in the mortgagee.

III. *The mortgage by conditional sale, kut-kubala, or bye-bil-wufa, (o)* is that in which the borrower, not making himself personally liable for re-payment of the loan (*p*), covenants that on default of payment of principal and interest on a certain date, the land pledged shall pass to the mortgagee. (*q*)

In a recent case (*r*) the Chief Justice of Madras (Sir Charles Turner) made the following observations on the different forms of mortgage by conditional sale.

"This form of Hindu mortgage under the names of *Kat-kubala*, *Muddatakriyam*, and *Gahan Lahan* obtains commonly throughout British India, though its incidents may vary. It is generally, though not universally, accompanied by the delivery of possession to the mortgagee with permission to enjoy the usufruct either in lieu of, or in part payment of the interest (*s*), and while ordinarily it involves no personal

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(*o*) The name given to a mortgage of this description in the Bombay Presidency would seem to be "*gahan lahan*"—see *per* Westropp, C.J., in *Bapuji Apaji v. Senavaraji Marvadi*, I. L. R. 2 Bom. 231 (*cf.* *p.* 238). "The term here usually applied to contracts, which undoubtedly are, in their inception at least, mortgages, but which contain a clause of conditional sale if the mortgage debt be not paid within a given time, is *gahan lahan*."

(*p*) *Mohanund Chaturjee v. Govindnath Ray*, 7 Sel. Rep. 92.

(*q*) *cf.* The Transfer of Property Act (Act IV of 1882) sec. 58, cl. (*c*).

(*r*) *Ramasami Sastrygal v. Samiyappanayakan*, I. L. R. 4 Mad. 179 (*cf.* *p.* 183).

(*s*) It is then a mortgage of the kind described below as a *kut-kubala usufructuary*.

obligation on the part of the mortgagor for repayment of the debt (*Macpherson on Mortgages*, 11), it may by special agreement or local custom, confer on the mortgagee the option of recovering the money from the mortgagor personally, or of availing himself of the sale. Although there is no precise form of words necessary to constitute such a mortgage, it ordinarily differs from the *bye-al-wufa* or *bye-bil-wufa* of the Muhammadans in this, that, in the Hindu form there is a preliminary mortgage with a condition for future sale, while in the Muhammadan form there is at once an absolute sale, with a counter-agreement for resale which may be contained in the original sale deed, or in a separate contemporaneous instrument. The origin and nature of this form of mortgage among the Muhammadans is explained in *Baillie's Muhammadan Law of Sale*, page 301. It was introduced or adopted in order to defeat the precept of Muhammadan law prohibiting usury. The lender, by stipulating for the usufruct, or for the payment of a price on the resale higher than he paid, secured the same advantage as would have accrued to him from placing his money at interest, while the transaction in form did not violate the law."

In mortgages by conditional sale, the mortgagor is liable to lose his estate, and when he does so, it passes at once to the mortgagee.

If the debt is not paid as stipulated, the mortgagee must, wherever Bengal Regulation XVII of 1806 is applicable, proceed to foreclose according to certain prescribed rules, converting the conditional sale into an absolute one, and obtaining possession. Until he takes such proceedings, the mortgagor remains in possession and enjoyment of the property, and has the right of redemption on paying off what is due on the mortgage; but on foreclosure, that right ceases, and the property passes wholly from the mortgagor and vests in the mortgagee.



A mortgage by conditional sale has under the Regulations in Bengal and the N. W. P. an operation different from what such transactions originally had. It is there to be regarded as a mortgage redeemable at any time by the mortgagor or those claiming under him in privity with his title as mortgagor (*t*). Apart from legislation, the essential characteristic of a mortgage by conditional sale was that on breach of the condition, the contract executed itself and the transaction was closed and became one of absolute sale without any further act of the parties or accountability between them. This was the character of such transactions before Bengal Regulation XVII of 1806 came into force; and this was the character given to them up to the years 1858 and 1864 respectively by the Courts in the Presidencies of Madras and Bombay where no enactment like Bengal Regulation XVII of 1806 has ever been in force. But from the former year the Sadr Court at Madras (*u*) and from the latter year the High Court at Bombay (*v*) adopted the practice of Courts of Equity in England, and allowed redemption of such mortgages after the expiry of the time limited by the contract, and this practice was for some years uniformly followed in both presidencies. In the year 1870, however, the Privy Council held in the case of *Pattabhiramier v. Vencatarow Naicken* (*w*) that contracts of conditional sale, whether effected as a security for a loan or not, are to be construed according to their tenor, and that the Courts are bound to give effect to them. In the opinion of their Lordships, what is known in English

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(*t*) *Prannath Roy Chowdry v. Rookea Begum*, 7 Moore's I. A. 323; S. C. 4 W. R. (P. C.) 37.

(*u*) *Narraina Chetty v. Ponniah Gounden*, S. D. A. Mad. 1858, p. 142.

(*v*) *Ramji Tukaram v. Chinto Sakham*, 1 Bom. H. C. 199.

(*w*) 13 Moore's I. A. 560, S. C. 7 B. L. R. 136.

law as "the equity of redemption" depends on the doctrine established by Courts of Equity, that the time stipulated in the mortgage deed is not of the essence of the contract. Such a doctrine is unknown to the ancient law of India, and exists in India now only by special legislation.

But this case did not cause the Courts in either Presidency to alter their practice. The Madras Court considered that the case was not binding on it, inasmuch as the judgment of the Privy Council appeared to be based on the mistaken assumption that there had been no course of decision in Madras admitting of relief after the time stipulated in the mortgage. (x) The Bombay Court held that the case did not apply to the Bombay Presidency, inasmuch as not only was the case one which went from the Presidency of Madras but it appeared from a passage in the judgment of the Privy Council that it was not their Lordships' desire or intention to disturb any such widely established practice as existed in Bombay. (y)

In the more recent decision of *Thumbarawmy Moodelly v. Hossain Rowthen* (z) the Privy Council has, however, reaffirmed its decision in *Pattabhramier's* case. Adverting to the rulings of the Courts in Madras and Bombay their Lordships observe: "The state of the authorities being such as has been described, it may obviously become a question with this committee in future cases whether they will follow the decision in the 13th Moore's Indian Appeals,

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(x) *Sri Rajah Lakshmi Chelliah Garu v. Sri Rajah Sri Krishna Bhupatu Devu Maharaz Garu*, 7 Mad. H. C. 6; see also *Samathal v. H. H. The Maharaja Mathoosri Kamatchi Amma Boyi Saib Avergul*, 7 Mad. H. C. 395.

(y) *Shankarbhai Gulabbhai v. Kassibhai Vithalbhai*, 9 Bom. H. C. 69; see also *Krishnaji v. Ravji Sadashiv*, 9 Bom. H. C. 79.

(z) I. L. R., 1 Mad. 1; L. R. 2 I. A. 248.

which appears to them based upon sound principles, or the new course of decision that has sprung up at Madras and Bombay, which appears to them to have been, in its origin, radically unsound. On a stale claim to redeem a mortgage, and dispossess a mortgagee who had, before 1858, acquired an absolute title, there would be strong reasons for adopting the former course. In the case of a security, executed since 1858, there would be strong reasons for recognizing and giving effect to the Madras authorities, with reference to which the parties might be supposed to have contracted. Their Lordships abstain from expressing any opinion upon this question until the necessity for determining it shall arise." (a)

Following this decision the High Court at Madras has lately ruled, in a case in which the term stipulated for the repayment of the loan had expired before 1858, that effect must be given to the conditions of the mortgage, and that the mortgagor could not therefore redeem (b), whilst in a case in which the mortgage was entered into subsequent to 1858, the same Court has held (Innes, J., dissenting) that the safer rule was to hold that the parties had contracted in reference to what was at the time pronounced by the Court to be law, and therefore that such a mortgage could be redeemed after the time limited by the contract. (c)

In Bombay, however, the High Court still considers that the decision of the Privy Council in *Thumbasawmy's* case is not binding on it. (d) In its opinion the case of *Ramgi Tukaram v. Chinto Sakharam* (e), although reflected upon, has not been overruled, and therefore must govern mortgages with

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(a) I. L. R., 1 Mad. 1 (cf. p. 23.)

(b) *Bapirazu v. Kamarazu*, I. L. R. 3 Mad., 26.

(c) *Ramasami Sastrigal v. Samiyappanayakan*, I. L. R., 4 Mad. 179.

(d) *Bapuji Apaji v. Senavaraji Marvadi*, I. L. R., 2 Bom. 231.

(e) 1 Bom. H. C. 199.

clauses of conditional sale, executed either before or after 1858 or 1864, until the contrary be expressly ruled by the Privy Council or ordained by the Legislature. In the same case the High Court examined the ancient law and usage as to *gahan lahan* mortgages in Bombay, and came to the conclusion that "not only is there not any reason for believing that the Courts of Justice or Nyadesh, which existed here anterior to British rule, treated such mortgages as irredeemable, after the time fixed had expired or enforced them as effective sales, but there is strong ground for believing that these mortgages never were so regarded by the people at large" (f); and further that "although the High Court in *Ramgi v. Chinto* were guilty of an infraction of the maxim *stare decisis*, we believe the original innovation upon a well settled and most beneficial usage was that of the Sadr Adalat, and that the Judges who decided *Ramgi v. Chinto* reverted to the generally understood construction of *gahan lahan* mortgages." (g)

As the cases at present stand, therefore, it would seem to be in Madras alone, and there only in the case of mortgages in which it is clear that the parties have not contracted in reference to the practice obtaining between 1858 and the decision of the Privy Council in *Thumbusawmy's* case, that mortgages by conditional sale are now construed as irredeemable after the time stipulated in the mortgage deed.

Combinations of these three pure forms give rise to two other kinds of mortgage, the one being the simple mortgage usufructuary, and the other the conditional mortgage usufructuary. (h)

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(f) *Bapuji Apaji v. Senavaraji Marvadi*, I. L. R. 2 Bom. 231 (cf. p. 239.)

(g) *Ibid.* p. 240.

(h) The Transfer of Property Act (Act IV of 1882), does not contain any definitions of these mixed forms of mortgage, but section 98 contemplates their existence.

IV. *The simple mortgage usufructuary* is that in which, though the property is only collaterally pledged, as in the case of a pure simple mortgage, the mortgagee is permitted to have the usufruct of it. This may be done either by simply allowing him to receive the rents and profits, or by giving him a lease for a limited period. In either case, the proceeds are credited to the mortgagor against interest, and, if they exceed what the mortgagee is entitled to for interest, against principal also. As in a pure simple mortgage, the mortgagor is personally liable, and his estate subject to be sold in default, though redeemable until it is so sold.

V. *The bye-bil-wufa or kut-kubala usufructuary.*—Where the mortgagee by conditional sale has the usufruct of the property, either by being merely put in possession and allowed to receive the rents and profits, or by having a lease given to him by the mortgagor. The position of the parties up to the date on which the loan is re-payable is in all respects the same as in a pure usufructuary mortgage. From that date their position resembles what it would be in a pure mortgage by conditional sale. But the mortgagee is in the receipt of the profits of the land. Until he has obtained a decree for foreclosure, he must account for such receipts, unless his mortgage was made after the passing of Act XXVIII of 1855, and the agreement is that the usufruct should be taken in lieu of interest. The mortgage is redeemed or cancelled whenever, prior to his obtaining a decree for foreclosure, the mortgagee has received a sum equal to the principal with interest at a rate not higher than 12 per cent. per annum, or (if the contract was entered into subsequent to the passing of Act XXVIII of 1855) whenever he has received the principal with interest at the stipulated rate, or at such rate as the Court shall think proper if there be no stipulation on the subject.

Though representatives of the various forms described above are to be found generally throughout India, mortgages not assignable to any one of these forms, exist in different parts of the country. It would be beyond the scope of this treatise to attempt to describe all the kinds of mortgage transactions to which local usage has given validity. The subject can only be dealt with by persons familiar with the customary law of each province (i). As however the more important of the local mortgages peculiar to certain parts of the Madras Presidency have formed the subject of recent rulings by the Madras High Court, it may be well shortly to state their nature.

The forms known as the *kanam* and *otti* mortgages are prevalent in Malabar. The *kanam* is a lease by way of mortgage to secure a loan advanced to the jenmi (proprietor) (j) and would seem, therefore, to be somewhat similar to a *zuripeshgi* lease in Bengal. By the custom of the country a condition is attached to all *kanam* demises that the mortgagor shall pay the value of improvements made by the mortgagee during the term before he can redeem (k). The *otti* differs from the *kanam* principally in two respects, first, in the right of pre-emption which the *ottidar* possesses in case the jenmi wishes to sell the land or to obtain further advances (l), and secondly, in the

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(i) For the anomalous mortgages to be found in the Punjab see Tupper's Punjab Customary Law, Vol. III, p. 217, *et seq.* The papers relative to the Bill which afterwards became the Transfer of Property Act (Act IV of 1882), shew the existence of anomalous mortgages in almost all the provinces of British India, and provision is made for such mortgages by section 98 of the Act.

(j) *Nelliya Variyath Silapani v. Vadakipat Manakel Ashtamurti Nambudri*, I. L. R., 3 Mad., 382.

(k) *Mana Vikrama, Zamorin of Calicut v. Surya Narayana Bhatta*, I. L. R., 5 Mad. 284.

(l) *Kumini Ama v. Parkam Kolusheri*, 1 Mad. H. C. 261; *Kunhamu*

amount secured which in the case of an *otti* is generally so large as practically to absorb, in the payment of the interest, the rent that would otherwise have been paid to the *jenmi* (*m*). The common feature of both these mortgages is that in the absence of express agreement they are not redeemable before the lapse of twelve years (*n*), whilst if an express agreement has been entered into on the point, they are not redeemable before the appointed time (*o*).

The *peruarthum* and the *iladarawara* mortgages may also be noted. The *peruarthum* mortgage, which obtains in some taluks of Malabar, is a mortgage by conditional sale, with this singularity that the sum payable on redemption is not a sum ascertained beforehand by agreement, but the then market value of the land (*p*). The *iladarawara* mortgage in South Canara is said to have been originally like an *otti* mortgage in Malabar. It appears to be usually a mortgage by way of lease, for a long term, and is not redeemable before the expiry of the term (*q*).

v. *Attapureth Illath Keshavan Nambudri*, I. L. R., 3 Mad., 246; *Ramapurath Pallankot Illath Cheria Krishnan Nambudri v. Ramapurath Pallankot Illath Vishnu Nambudri*, I. L. R., 5 Mad., 198; and *Marakar v. Munhoruli Parameswaran Nambudri*, I. L. R., 6 Mad., 140.

(*m*) *Kumini Ama v. Parkam Kolusheri*, 1 Mad. H. C. 261; *Perlathail Subba Rau v. Mankude Narayana*, I. L. R., 4 Mad., 113 (*cf. p.* 118).

(*n*) *Shekhara Paniker v. Raru Nayar*, I. L. R., 2 Mad., 193.

(*o*) *Keshava v. Keshava*, I. L. R. 2 Mad., 45.

(*p*) *P. Shekari Varma Valia Raja v. Mangalom Anugar*, I. L. R., 1 Mad., 57; *Kamosami Sastrigal v. Samiyappanayakan*, I. L. R., 4 Mad., 179 (*cf. p.* 184).

(*q*) *Perlathail Subba Rau v. Mankude Narayana*, I. L. R. 4 Mad., 113, (*cf. p.* 118). See also *Mailaraya v. Subbaraya Bhut*, 1 Mad. H. C. 81.



## CHAPTER III.

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### OF PERSONS CAPABLE OF MORTGAGING.

EVERY person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject (a). The right to mortgage is *primâ facie* incident to the right of property, and co-extensive with it; but to this rule there are exceptions in the cases of minors and persons of unsound mind, and of persons who are disqualified by law from mortgaging (b). And those whose rights are of a limited or qualified nature, cannot do any valid act in excess of these rights. Thus a Hindu widow, holding property belonging to her husband's estate which devolved to her by succession, upon his death, cannot, except under certain circumstances, make a mortgage which will be valid against the heirs in reversion of the husband. And if the estate is ancestral property belonging to a Hindu family in which the doctrines of the Mithila school or the Mitakshara prevail, and has been mortgaged without the consent of all those interested in it, or if the land is *mal-i-wuqf* or *dewuttur*, devoted to religious purposes, a mortgage of it may generally be set aside.

It may also be observed that the right to mortgage may in certain cases exist apart from the right of property.

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(a) The Indian Contract Act (Act IX of 1872), sec. 11.

(b) The disqualification need not be express. A person may be disqualified from contracting by necessary implication from a reasonable construction of the law. See *Dhunput Singh v. Shooobhudra Kumari*, I. L. R., 8 Calc., 620.

Thus a mortgage may be made for certain purposes of a minor's property by his guardian, and of the estate of a disqualified proprietor by the Court of Wards (*c*).

A person is said to be of sound mind for the purpose of making a contract, if at the time when he makes it he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. One who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind,—but he cannot make a contract when he is of unsound mind (*d*).

If a person is adjudged under Act XXXV of 1858 (which deals with the estates of lunatics who are not subject to the ordinary original jurisdiction of the High Courts) to be of unsound mind and incapable of managing his affairs, the Civil Court may, unless the Court of Wards exercises the power given it by the Act (*e*) appoint a manager of his estate (*f*). If a manager of the estate is appointed, such manager has not power to sell or mortgage the estate, or to grant a lease of any immoveable property for a period exceeding five years, without an order of the Civil Court by which the manager was appointed, previously obtained (*g*). It is in truth wholly unsafe to lend money to a person of unsound mind or his *de facto* guardian or manager, on the security of a mortgage of the lunatic's property, unless the guardian is also *de jure* guardian and has been appointed under the Act, and unless the mortgage is sanctioned by the Court. It has been held that all dealings with the property

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(*c*) *cf.* The Transfer of Property Act (Act IV of 1882), sec. 7, which declares that a person "authorized to dispose of transferable property not his own" as well as one who is "entitled to transferable property" is, under certain circumstances, competent to transfer such property.

(*d*) The Indian Contract Act, (Act IX of 1872), sec. 12.

(*e*) *Manohar Lal v. Gauri Shankar*, I. L. R., 1 All. 476.

(*f*) Act XXXV of 1858, sec. 9.

(*g*) *Ib.* sec. 14.

of a lunatic, to be binding, must be effected by a guardian or manager duly appointed under Act XXXV of 1858, and that a *de facto* manager can have no greater powers than one duly appointed. And when the mother of a person of unsound mind, who had not been appointed manager under the Act, mortgaged his estate without the previous sanction of any Court, the mortgagee's suit for foreclosure was dismissed (*h*).

But the Court will not interfere in every case in which an application is made to it. When the son-in-law of a lunatic, a member of a joint Mitakshara family, who had an interest both in joint ancestral property and in property inherited collaterally which might, but was not shown to belong to him separately, applied to the Court to declare his father-in-law a lunatic, and to appoint a manager of the estate and guardian of the person, the Court refused to grant the application holding that under the circumstances no sufficient case was made out for its interference (*i*). In the same case the Court expressed a strong opinion, though it did not decide the point, that the Act applied to a member of a Mitakshara family.

In a recent case the question whether a right to sue for the possession of property was sufficient to confer jurisdiction under the Act was raised but not decided (*j*).

In cases in which proceedings in lunacy have been taken under Act XXXIV of 1858 (*k*) in the High Court on its

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(*h*) *The Court of Wards v. Kupulmun Sing*, 10 B. L. R., 364; S. C. 19 W. R. 164.

(*i*) *Bhoopendra Narain Roy v. Greesh Narain Roy*, I. L. R. 6 Calc., 539.

(*j*) In the matter of the petition of *Mahomed Busheerul Hossein*, I. L. R. 8 Calc. 263.

(*k*) It has been held in Bombay that the term "unsound mind" in sec. 1 of this Act comprehends imbecility, whether congenital or arising from old age, as well as lunacy or mental alienation resulting from disease. In the matter of *Cowasji Beramji Lilaoovala*, I. L. R. 7 Bom. 15.

Original Side, the person placed in charge of the lunatic's estate is called the Committee. The Court may (*l*), if it appears to be just or for the lunatic's benefit, order that any property, movable or immovable, of the lunatic be sold or charged by way of mortgage as may seem most expedient. The purposes for which money may be so raised are,—the payment of the lunatic's debts, including any debt incurred for his maintenance or otherwise for his benefit; the discharge of any incumbrance on his estate; provision for his future maintenance; and the payment of the costs of any inquiry under the Act, &c. Section 19 directs that the Committee of the lunatic's estate shall, in the name and on behalf of the lunatic, execute all such conveyances and instruments of transfer relative to any sale, mortgage, or other disposition of his estate as the Court shall order. And Section 20 provides that when a person having contracted to mortgage his estate, afterwards becomes lunatic, the Court may, if the contract is one which it thinks ought to be performed, direct the Committee of the estate to execute the necessary conveyance and fulfil the contract. If the lunatic is possessed of land situated beyond the local limits of the ordinary original jurisdiction of the High Court, which by the law in force for the time being subjects the proprietor, if disqualified, to the superintendence of the Court of Wards, the Court of Wards may assume charge of the land and manage it: but this does not affect the provisions as to the necessity of obtaining the High Court's order sanctioning any proposed mortgage (*m*).

It has recently been held by the High Court at Allahabad that Act XXXIV of 1858 applies only to the Courts of Judicature in India then established by Royal Charter, and

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(*l*) Act XXXIV of 1858, sec. 18.

(*m*) *Ibid.* sec. 24.

that therefore it does not apply to the High Court at Allahabad, which was not established till 1866, and has no original jurisdiction under section 12 of its Charter in respect of the persons and estates of lunatics, who are natives of India (n).

The property of persons whose estates are under the charge of the Court of Wards cannot be legally mortgaged or otherwise dealt with, save under the provisions of the special Acts which regulate the powers and proceedings of the Court of Wards.

Under the Act in force in Lower Bengal, Act IX of 1879 of the Bengal Council (o), all proprietors of estates are to be held disqualified to manage their own property when they are—females declared by the Court (p) incompetent to manage their own property; persons declared by the Court to be minors; persons adjudged by a competent Civil Court to be of unsound mind and incapable of managing their affairs; or persons adjudged by a competent Civil Court to be otherwise rendered incapable, by physical defects or infirmities, of managing their own property. Whenever the sole proprietor of an estate, or all the joint proprietors of an estate are so disqualified, the Court has power to take charge of all the property of every such proprietor or joint proprietor within its jurisdiction, and of the person of any such proprietor or joint proprietor who is resident within its jurisdiction, and also of the person and property of any minor member of the family of any such proprietor or joint proprietor, who has an immediate or reversionary interest in the property of such proprietor or joint proprietor (q). No person who is under the charge of the Court of Wards, or

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(n) In the matter of the petition of *Jaundha Kuar v. The Court of Wards*, I. L. R. 4 All. 159.

(o) Sec. 6.

(p) i.e., The Court of Wards, cf. sec. 3.

(q) Sec. 7.

whose property is under such charge, is competent to create, without the sanction of the Court, any charge upon or interest in his property or any part thereof (*r*). The Court of Wards has power to sanction the giving of leases or farms of the whole or part of any property under its charge, and may direct the mortgage or sale of any part of such property, and may direct the doing of all such other acts as it may judge to be most for the benefit of the property, and the advantage of the ward (*s*); and the Court may exercise all its powers through the Commissioners of the Divisions and the Collectors of the Districts in which any part of the property of the disqualified proprietor may be situated, or through any other person whom it may appoint for such purpose (*t*). But nothing contained in the Act is to affect Act XXXIV of 1858, or the jurisdiction as respects infants of any High Court of Judicature (*u*).

The law in force in the North-Western Provinces (*v*) is contained in Act XIX of 1873 (*w*), (as amended by Act VIII of 1879) (*x*), and though in the main the same as the Bengal law, it differs in some respects from it. In addition to the classes specified in Bengal Act IX of 1879, two other classes of persons are in the North-Western Provinces held to be disqualified persons, *viz.*, persons convicted of a non-bailable

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(*r*) Sec. 60. This provision is new, the previous enactments relating to Courts of Ward being silent on the point. See *Dhunput Singh v. Shooobhudra Kumari*, I. L. R. 8 Calc. 620.

(*s*) Sec. 18.

(*t*) Sec. 15.

(*u*) Sec. 4.

(*v*) The law relating to Court of Wards in other Provinces will be found,—for Oudh, in Act XVII of 1876, ss. 161—177; for the Punjab in Act IV of 1872, ss. 34—38, as amended by Act XII of 1878, ss. 3—4; and for Ajmir in Reg. II of 1877, ss. 101—105.

(*w*) Chapter VI, (ss. 193—206.)

(*x*) ss. 18—24.

offence and disqualified in the opinion of the local Government by vice or bad character from managing their own estates, and persons declared by the local Government, on their own application, to be disqualified from managing their estates (y). Again Act XIX of 1873 contains no provision similar to that in section 7 of Bengal Act IX of 1879, empowering the Court of Wards to take possession of the person and property of a minor member of the family of a disqualified proprietor. Further section 205B of Act XIX of 1873, as amended by section 24 of Act VIII of 1879, not only declares a disqualified proprietor incompetent to create, without the sanction of the Court, any charge upon or interest in his property, which is under the superintendence of the Court of Wards (z), but declares that no such property shall be liable to be taken in execution of a decree made in respect of any contract entered into by a disqualified proprietor while his property is under such superintendence.

Several cases have occurred in which the question whether a person has been duly constituted a Ward of Court has been raised. When the course of proceeding provided by Bengal Regulation LII of 1803, (the Regulation applicable to the ceded and conquered provinces, and which was almost *verbatim* the same as Bengal Regulation X of 1793, which applied to the Lower Provinces of Bengal) for having a disqualified proprietor made a Ward of Court had not been followed, the Privy Council came to the conclusion that the mere fact of the property remaining under the charge of the Court of Wards, without the necessary steps being taken to have the disqualified proprietor declared a Ward of Court, was not sufficient to make the provisions of the Regulation applicable to the disqualified proprietor, or, in other words,

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(y) Act XIX of 1873, s. 193 cl. (f) and (g).

(z) *cf.* Act IX (B. C.) of 1879, s. 60.



to render her a Ward of Court, and therefore that she was capable of contracting debts (a).

But the decision will depend on the circumstances of each case. So, in a case, where the evidence was somewhat meagre and unsatisfactory as to the proceedings of the Court of Wards, both as to the circumstances under which they took possession of the estate and their dealings with it afterwards, but nevertheless, it was clearly established that the Court of Wards had assumed and retained, the management of the estate, under the provisions of Bengal Regulation LII of 1803, on the ground that the proprietress was incompetent to manage the same, the Privy Council distinguished the case from their decision above referred to, and held that the estate had been duly placed under the management of the Court of Wards, and that the disqualified proprietress was incapable of charging the same (b).

Again, in a case under Bengal Regulation X of 1793, where it was proved that, though the procedure laid down by that Regulation was not strictly followed, the Court of Wards had, as a fact, taken charge of an estate, and the matter had been reported so as to give Government an opportunity of exercising its discretion if it saw fit, to declare the proprietress competent to manage her estate, the High Court held that the requirements of the Regulation had been substantially complied with, and the proprietress was duly constituted a Ward of Court (c).

In the Bengal case last referred to, the Court decided (d) that on a reasonable construction of the whole of Bengal Regulation X of 1793, a Ward of Court, duly constituted as such, is not thereby absolutely incapacitated from contracting, but the power of the Ward to contract is taken

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(a) *Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer*, 11 Moore's I. A. 468.

(b) *Balkrishna v. Masuma Bibi*, I. L. R. 5 All. 142.

(c) *Dhunput Singh v. Shooobhudra Kumari*, I. L. R. 8 Calc. 620.

(d) *Ibid.* pp. 628—629.

away so far as regards all property which, under the provisions of the law, comes under the charge and control of the Court. In the opinion of the Court, sec. 60 of the present law (e) merely states in express language what is the result of a reasonable construction of the old Regulations. It was, therefore, held in the suit, which was one by a mortgagee against a Ward of Court, who had given him a mortgage of certain of her property under the charge of the Court, that the plaintiff could not enforce his lien against that property, but that he was entitled to a personal decree against the mortgagor, who could be made liable upon her contract according to the usual procedure in force in the country.

The view taken by the High Court of the North-Western Provinces as to the law in force there is similar, for it has been ruled by that Court that reading the provisions of the law as contained in Chapter VI of Act XIX of 1873, and the amendments thereof provided in Act VIII of 1879, the mere disqualification of a proprietor to manage his estate does not carry with it a general and absolute disqualification to enter into any contracts at all. Section 24 of Act VIII of 1879 certainly says nothing of the kind; on the contrary, the terms of the second paragraph of sec. 205B, which that section inserts in Act XIX of 1873, seem to contemplate that contracts may in some cases be entered into, but it prevents decrees obtained in suits upon them being enforced in execution against the property which is out of the custody and control of the disqualified person and in the hands of the Court of Wards. The Court therefore held that a simple money-decree could be given against a disqualified proprietor who had given a personal bond to secure the repayment of a loan borrowed by her whilst her property was under the superintendence of the Court of Wards (f).

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(e) Act IX (B. C.) of 1879.

(f) *The Collector of Benares v. Sheo Persad*, I. L. R., 5 All, 487.

In Madras (*g*) the Board of Revenue is constituted the Court of Wards by Madras Regulation V of 1804, and is given full power and authority to take cognizance of all cases of property devolving to heirs incapacitated by minority, sex, or natural infirmity for administering their own affairs. The exercise of this power is however subject to the consent of the Governor in Council in each separate case (*h*). Minors are declared not competent to administer their own affairs (*i*), and persons succeeding to property by inheritance but incapacitated by lunacy, idiotism, or other natural infirmity are not to take charge or administer the affairs of such property on their own behalf (*j*). The affairs of incapacitated persons, whose property has, on the decision of the Governor in Council, been committed to the care of the Court of Wards, are to be managed by a person appointed by the Court (*k*). Such managers have the entire charge of the estate, real and personal, of the incapacitated proprietors, including all malguzari and lakhiraj lands, and all houses, tenements, goods and moveable property, excepting only the house in which the proprietors may reside, together with the articles of moveable property required for the use and comfort of the said proprietors (*l*), but managers of the property of minors are not competent to grant leases extending beyond the period of one year without the consent of the Collector had in writing, nor to dispose of any part of the property without the permission of the Court of Wards also obtained in writing (*m*).

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(*g*) In Bombay there is no Court of Wards. See however Bom. Reg. VIII of 1827, s. 9.

(*h*) Mad. Reg. V of 1804, sec. 2.

(*i*) *Ibid.* sec. 4.

(*j*) *Ibid.* sec. 5.

(*k*) *Ibid.* sec. 8.

(*l*) *Ibid.* sec. 12.

(*m*) *Ibid.* sec. 15.

Wherever the property may be situated, it is evident that any one lending money on the mortgage of property under the charge of the Court of Wards must take care that the mortgage is made in strict accordance with the law.

It may here be noticed that landholders who take the benefit of the special Acts in force in various parts of India for the relief of landholders who are in debt, or whose immoveable property is subject to incumbrances, are for the time being disqualified from mortgaging, or otherwise alienating such property (*n*). With the exception of the last of them which lays down a somewhat different scheme for the liquidation of the landholder's debts (*o*), all these Acts provide for the appointment of a manager of the property of the indebted landholder, and confer on such manager (among other powers) power, with the previous assent of a higher authority, to raise money for the settlement of the debts of the landholder by (among other means) demising by way of mortgage the whole or any part of the property under management for a term not exceeding twenty years from the publication of the order of management (*p*).

Of a somewhat similar nature are the provisions to be found in the present Code of Civil Procedure (*q*),

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(*n*) The Chutia Nagpur Encumbered Estates Act (Act VI of 1876) s. 3; the Sindh Incumbered Estates Act (Act XX of 1881) s. 9; the Broach and Kaira Incumbered Estates Act (Act XXI of 1881) s. 9; the Jhansi Incumbered Estates Act (Act XVI of 1882) s. 8. Acts XX and XXI of 1881 are merely re-enactments of former Acts, *viz.*, Acts XIV of 1876 and XIV of 1877.

(*o*) See the Jhansi Incumbered Estates Act (Act XVI of 1882) Chap. V.

(*p*) See the Chutia Nagpur Encumbered Estates Act (Act VI of 1876) s. 18; the Sindh Incumbered Estates Act (Act XX of 1881) s. 24; and the Broach and Kaira Incumbered Estates Act (Act XXI of 1881) s. 24. The Acts themselves must be referred to for further information on this point.

(*q*) Act XIV of 1882, ss. 320—325C. See also sec. 326, and compare

prescribing the procedure to be followed by the Collector in those local areas in which the local Government has notified (r) that the execution of decrees in cases in which a Court has ordered any immovable property to be sold, or of any particular kind of such decrees, or of decrees ordering the sale of any particular kind of, or interest in, immovable property shall be transferred to the Collector. Among other powers conferred on him, the Collector, to whom a decree has been so transferred, may raise the amount of the decree, or, when the Collector has under the provisions to this effect held an inquiry and ascertained the amount of all the money-decrees obtained against the judgment-debtor, the amount required for the discharge of all such decrees, by mortgaging the whole or any part of the immovable property of the judgment-debtor, ordered to be sold or available for the discharge of such money-decrees, while the judgment-debtor is for the time being declared incompetent to mortgage, charge, lease or alienate the immovable property, which is available for satisfaction of such money-decrees. The Code further (s) gives like powers to the Collector when an insolvent judgment-debtor possesses, in any local area in which a declaration has been made under section

the powers conferred on the Collector, and the disability imposed on the judgment-debtor, or insolvent, by the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) ss. 22, 29; 30 and 31.

(r) Notifications have been issued under this section for districts in Bombay (see *Bombay Government Gazettes*, dated 3rd June 1880, Part I, p. 519, and 17th March 1881, Part I, p. 140) ; for the N.-W. P. (see *N.-W. P. Gazette*, dated 4th September 1880, Part I, p. 340) ; for the Central Provinces (see *Central Provinces Gazette*, dated 1st December 1877, Part IA, p. 313) ; and for the district of Bassein in British Burma (see *British Burma Gazette*, dated 7th March 1883, Part I, p. 92.)

(s) Sec. 356. The Insolvent Act (11 & 12 Vic. c. XXI s. 32) also confers power in certain cases to raise money for the discharge of an insolvent's debts by mortgage instead of by sale.

320 and is in force, immovable property paying revenue to Government, or held or let for agricultural purposes, and prohibits the Receiver from selling such property.

Any private alienation, whether by sale, gift, mortgage or otherwise, of property attached in execution of a decree is void as against all claims enforceable under the attachment (*t*). A Court may however under certain circumstances grant a certificate to a judgment-debtor authorizing him, within a period to be mentioned therein, to raise the amount of a decree by mortgage or lease or private sale of immovable property, for the sale of which an order has been made; but in such a case all moneys payable under the mortgage, lease or sale, are to be paid into Court, and the mortgage, lease or sale is not to become absolute until confirmed by the Court (*u*).

Minors (not under the Court of Wards) are incapable of executing a mortgage of their property so as to bind themselves (*v*). But a mortgage by a minor's legal guardian is valid and will be sustained, if made *bond fide* and for the

(*t*) Act XIV of 1882, s. 276, and see *Gobind Singh v. Zalim Singh*, I. L. R. 6 All. 33.

(*u*) Act XIV of 1882, s. 305.

(*v*) As to what is the age of majority, see Act IX. of 1875; Act XL of 1858; and Act XX of 1864. See also *Mothoormohun Roy v. Soorendro Narain Deb*, I. L. R., 1 Calc. 108; *Cally Churn Mullick v. Bhuggobutty Churn Mullick*, 10 B. L. R. 231; *Madhusudan Manji v. Debigobinda Newgi*, 1 B. L. R. (F. B.) 49; *Jumoon Dassya v. Bamasoondari Dassya*, I. L. R. 1 Calc. 289; SC., L. R. 3 I. A. 72; *Suttja Ghosal v. Suttjanund Ghosal*, I. L. R. 1 Calc. 388; *Chunee Mul Johary v. Brojo Nath Roy Chowdhry*, I. L. R. 8 Calc. 967; *Stephen v. Stephen*, I. L. R. 9 Calc. 901; *Khwahish Ali v. Surju Prasad Singh*, I. L. R. 3 All. 598; *Periyasami v. Seshadri Ayyangar*, I. L. R. 3 Mad. 11; *Puyikuth Ithayi Umah v. Kairhirapokil Mamod*, I. L. R. 3 Mad. 248; *Shivji Hasam v. Datu Marji Khoja*, 12 Bom. H. C. 281, (cf. p. 289); *Shiddheshvar v. Ramchandrarav*, I. L. R. 6 Bom. 463.

benefit of the minor and of his property (w). A guardian who mortgages his ward's property, ought to do so in his character of guardian, and not as if he were himself proprietor (x).

The leading case on this subject is that of *Hunoomanpersaud Panday v. Mussamat Babooee Munraj Koonweree*, in the Privy Council (y). A Ranee, the guardian of, or manager for her minor son, mortgaged ancestral lands which had on his father's death descended to the son as heir. In the mortgage deed she was described not as guardian or manager but as being herself absolute proprietor, and the deed was in consequence set aside by the Agra Court (z). But on appeal to the Privy Council this decision was reversed. Their Lordships remark, (a) with reference to the point of the mother having described herself as proprietor instead of a guardian or manager, that the Lower Court "did not enter upon the question of the validity of the charge in whole or in part, as a charge effected by a *de facto* manager or proprietor whether by rightful or wrongful title, nor advert to the fact that the charge included some items of former charge wholly unaffected by the objection which they considered of such weight." And after some further

(w) *Kallupnath Singh v. Kamlaput Jah*, 4 Sel. Rep. 339; *Jag Mohan Bose v. Pitambar Ghos*, 5 Sel. Rep. 82; *Ram Lochun Rae* v. *Ramunee Mohun Ghose*, S. D. A. 1846, p. 371; *Gooroopersaud Jena v. Muddunmohun Soor*, S. D. A. 1856, p. 980; *Birch v. Reid*, S. D. A. (N. W. P.) 1851, p. 234; see also *Lala Rukmonlal v. Seokaunth*, S. D. A. 1856, p. 392.

(x) *Brown v. Ram Kunnee Dutt*, S. D. A. 1848, p. 791; *Hurshewukmun Tewaree v. Gajapershadmun Tewaree*, S. D. A. (N. W. P.) 1853 p. 156.

(y) 6 Moore's I. A. 393.

(z) *Babooa Munraj Koonwur v. Hunoman Pande*, S. D. A. (N. W. P.) 1852, p. 21.

(a) *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*, 6 Moore's I. A. 393 (cf. p. 410.)



observations they continue (b) : "It is not suggested that she ever claimed any beneficial interest in the estate as proprietor: had she done so, it would have been *pro tanto* a claim adverse to her son: and it is conceded that she did not claim adversely to her son. The terms 'proprietor' and 'heir' when they occur, whether in deeds or pleadings or documentary proofs, may indeed by a mere adherence to the title be construed to raise the conclusion of an assumption of ownership in the sense of beneficial enjoyment derogatory to the rights of the heir: but they ought not to be so construed, unless they were so intended, and in this case their Lordships are satisfied that they were not so intended. They consider that the acts of the Ranee cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself, or others gave to her, and that she must be viewed as a manager inaccurately and erroneously described as 'proprietor' or 'heir:' and it is to be observed that the Collector takes this view, for whilst he remarks on the improper description of her as heir, or proprietor, he continues her name as 'Surberakar.' If the whole context of all these documents and pleadings be taken into consideration, and the construction proceed on every part, and not on portions of them, they are sufficient in their Lordships' judgment to show the real character of her proprietorship."

On the general question of the power of a minor's guardian or manager to mortgage the minor's estate, and of the degree to which the *onus* is thrown on the mortgagee of proving that the charge was created for the benefit of the minor and from necessity,—their Lordships thus lay down the law (c) : "The power of the manager for an infant heir

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(b) *Hunoomanpersaud Panday v. Mussamut Babooee Munraj Koonweree*, 6 Moore's I. A. (cf. p. 412.)

(c) *Ibid.* p. 423.

to charge an estate not his own, is under the Hindu law a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance the charge is one that a prudent owner would make, in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But of course if that danger arises, or has arisen, from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted *malâ fide*, will not be affected though it be shown that with better management the estate might have been kept free from all debt. Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that under such circumstances he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that therefore the mere creation of a charge securing a proper debt cannot be viewed as improvident management. The purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and

rightly directing the actual application. Their Lordships do not think that a *bond fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived" (d).

The question as to the existence of a necessity must be decided upon the evidence in each case as it arises. It has been held that, as the performance of the father's *shrad* is incumbent on the son, where there are no other funds available for the purpose, money may properly be lent to the son, though a minor, in order to enable him to perform his father's *shrad* suitably (e).

A minor is not bound by a contract entered into by his guardian who borrowed money merely to enable him to assert a right of pre-emption to certain property and to complete a contract which he had unnecessarily made to purchase certain other property (f).

Due care and attention must be used by a mortgagee or purchaser dealing with a minor or his guardian: and the mere absence of any fraudulent intention is not sufficient. The *bona fides* of the mortgagee or purchaser is a matter which must be determined in each case. A sale by a guardian having been set aside on the ground that the sale was not warranted by law, as made without necessity, the purchaser appealed to the High Court urging

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(d) See also *Maha Beer Pershad Singh v. Dumreeram Opadhya*, W. R. 1864, p. 166; *Baboo Kumola Pershad Narain Singh v. Nolk Lal Sahoo*, 6 W. R. 30; *Ram Pershad Sookul v. Rajunder Sahoy*, 6 W. R. 262; *Radha Kishore Mookerjee v. Mirtoonjoy Gow*, 7 W. R. 23; *Looloo Singh v. Rajendur Laha*, 8 W. R. 364; *Roop Narain Singh v. Gugadhur Pershad Narain*, 9 W. R. 297.

(e) *Sukeenah Banoo v. Huro Churn Buruj*, 6 W. R. 34. As to what amounts to "necessity," see *post* as to alienations by members of a joint Hindu family by a childless Hindu widow.

(f) *Nubokant Dass v. Syud Abdool Juleel*, 20 W. R. 372. See also *Radha Pershad Singh v. Mussamut Talook Raj Koor*, 20 W. R. 38.

that he acted *bonâ fide*, and that there was no express finding of the Lower Court that he acted otherwise. But the appeal was dismissed, the Court observing,—“We think the finding of the Lower Court, although it does not amount to a finding of fraud or collusion on the part of the purchaser, is substantially a declaration that he did not act *bonâ fide*, that is to say, that if in fact he believed that there was a legal necessity for the sale which the guardian was making, he had not exercised due care and attention in arriving at that belief. \* \* \* \* It seems clear that the purchaser cannot have made any real attempt to satisfy himself as to the necessity for the sale. He is therefore not a purchaser who is protected by the ruling of the Privy Council in the case of *Hunoomanpersaud Panday*” (g).

When a person, after attaining majority, questions a sale of his property made by his guardian during his minority, the *onus* lies on him who upholds the purchase, not only to show that under the circumstances of the case the guardian had the power to sell, or that the purchaser reasonably supposed he had the power, but further to show that the whole transaction so far as regarded the purchaser was *bonâ fide* (h).

And a minor is not concluded by his guardian's assent to a *butwara*, unless it is proved that the guardian acted *bonâ fide* and with due regard to the interests of the minor (i).

(g) *Gour Pershad Narain v. Sheo Pershad Ram*, 5 W. R. 103. See also *Syud Lootf Hossein v. Dursun Lall Sahoo*, 23 W. R. 424; *Poolunder Singh v. Ram Pershad*, 2 N. W. P., (Agra) H. C. 147.

(h) *Roop Narain Singh v. Gugadhur Pershad Narain*, 9 W. R. 297; *Kebul Kristo Doss v. Ram Coomar Shah*, 9 W. R. 571; *Ram Pershad Sookul v. Rajunder Sahoy*, 6 W. R. 262; *Muthoorra Dass v. Kanoo Beharee Singh*, 21 W. R. 287.

(i) *Baboo Huree Pershad Jha v. Muddun Mohun Thakoor*, 17 W. R. 217. See also *Massamut Syedun v. Syud Felayet Ali Khan*,

But where a guardian had joined (on behalf of the minor) in a compromise which the Court approved by a decree, it was held by the Privy Council, on an attempt made by the minor fifteen years afterwards to dispute the compromise, that the *onus* lay wholly on him. Their Lordships said: "It is undoubtedly the duty of guardians scrupulously to regard the interests of minors in dealing with their estates; and the Court will when necessary enforce the performance of this duty. But the interests of infants would seriously suffer if a notion were to prevail that guardians were bound for their own security to contest all claims against an infant's estate, whether well or ill founded: and such a notion might prevail, if the compromise of a claim of debt confirmed by a decree of a Court were to be set aside after sixteen years without distinct proof of fraud" (*j*).

The holder of a certificate of administration under Act XL of 1858 has the same powers as regards the management of the minor's estate as might have been exercised by the proprietor himself if not a minor. But such a certificate gives no power to sell or mortgage any immovable property, or to grant a lease for any period exceeding five years, without an order of the Civil Court previously obtained (*k*). However, notwithstanding the absence of any such order, a minor's suit to recover possession was dismissed in a case in which it was proved that the mortgage made by the guardian was in fact a proper one, and there

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17 W. R. 239; *Buzrung Sahoy Singh v. Mussamut Mautora Chowdhraim*, 22 W. R. 119.

(*j*) *Baboo Lekraj Roy v. Baboo Mahtab Chand*, 14 Moore's I. A. 393 (cf. p. 398); S.C. 10 B. L. R. 35.

(*k*) Act XL of 1858, sec. 18. *Shurrut Chunder v. Rajkissen Mookerjee*, 15 B. L. R. 350; S.C. 24 W. R. 46; *Debi Dutt Sahoo v. Subodra Bibee*, I. L. R. 2 Calc. 283.

had subsequently been a decree in a suit in which the minor was represented, under which decree the property had been sold (l). But the case was a special one, and cannot apparently be treated as a precedent (m).

It has been held by a Full Bench of the Calcutta High Court that the rules laid down in Act XL of 1858 from section 18 downwards apply only to certificated managers and to guardians appointed under the Act, and therefore that the provisions of Hindu and Mahomedan law are still applicable to guardians, who do not avail themselves of the Act (n). The Allahabad High Court has also held that Act XL of 1858 does not preclude the natural and legal guardian of a Hindu minor from dealing with his property within the limits allowed by Hindu law without having acquired a certificate of administration from the Civil Court (o). The Privy Council has however recently decided that a co-sharer in ancestral family property, under the Mitakshara law, the co-proprietors being minors, though he may have power to manage the property, is not in consequence the guardian of such minors for the purpose of binding them by the execution of a bond charging the property. By section 2 of Act XL of 1858 minors in Bengal (unless taken under the protection of the Court of Wards) are subject to the jurisdiction of the Civil Court from which a certificate of administration must be obtained before any person can become the legal guardian of a minor (p).

(l) *Sreemutty Ahfutocnnissa v. Goluck Ohunder Sen*, 22 W. R. 77.

(m) See *Debi Dutt Sahoo v. Subodra Bibee*, 1 L. R. 2 Calc. 283 (cf. p. 287).

(n) *Ram Ohunder Chuckerbutty v. Brojonath Mozumdar*, 1 L. R. 4 Calc. 929.

(o) *Roshan Singh v. Har Kishan Singh*, 1 L. R. 3 All. 535.

(p) *Durgapersad v. Keshopersad Singh*, 1 L. R. 8 Calc. 656.

In Bombay (*q*), where Act XX of 1864 takes the place of Act XL of 1858, the cases appear to be conflicting. In 1871 it was ruled that an alienation by the natural guardian of a ward's immoveable estate made without having obtained a certificate under the Minor's Act (Act XX of 1864) is invalid (*r*). In 1874 the High Court expressed its dissent from that decision in so far as it was there ruled that the "property" itself of the minor vested in the Court under sec. 1 of Act XX of 1864. It pointed out that it is only "the charge of the property" which is to vest in the Civil Court, and held that until the Court was moved to do so, and thought proper to take charge of the property of a minor, the property of a minor cannot be regarded as in the charge of the Court (*s*). But in a recent case the High Court has followed the decision of 1871, and held that a sale by a widow on behalf of her minor son was invalid as she had not obtained a certificate of administration to her husband's estate under Act XX of 1864 (*t*).

The question of the distinction between a sale made under section 18 of Act XL of 1858, and one made by an uncertificated guardian was considered in a case in which the Chief Justice (Sir R. Garth) held that the purchaser, who buys in good faith, under an order made under that section, acquires a good title to the property sold, unless the minor or those claiming under him can show at some future time that the sale was fraudulent or improper. Prinsep, J.,

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(*q*) For the law in Madras see Mad. Regulations V of 1804, ss. 20—22, and X of 1831, s. 3, and Acts XXI of 1855 and XIV of 1858. See also *Naduvath Mannakel Subramanyan Nambudripad* (The petition of), I. L. R. 6 Mad. 187.

(*r*) *Bai Kesar v. Bai Ganga*, 8 Bom. H. C. (A. C. J.) 31.

(*s*) *Shinji Hasam v. Datu Marji Khaja*, 12 Bom. H. C. 281 (cf. p. 288).

(*t*) *Kuwarji v. Moti Haridas*, I. L. R. 3 Bom. 234.



though apparently accepting this as the general rule, considered that when the purchasers are themselves the creditors of the family whose debts it is the object of the alienations to liquidate, and have therefore the means of satisfying a Court as to the origin and nature of those debts and how they are binding on the minor, the burden of proof is shifted on their shoulders as soon as the plaintiff has established a *prima facie* case (*u*).

When a minor was admittedly on the point of attaining the age of eighteen, the Court refused to grant a certificate under Act XL of 1858, holding that in such a case a certificate should not be granted unless under particular circumstances, as where very great weakness of mind is proved, or where it is shown that there is some absolute necessity for granting the certificate (*v*).

A certificate cannot be granted under Act XL of 1858 when the minor is only entitled to an undivided share in joint family property subject to the Mitakshara law (*w*), and a similar rule has been laid down in Bombay under Act XX of 1864 (*x*), though the opposite view has been adopted in a recent case (*y*).

A mortgage made by a guardian to whom the rules laid down in Act XL of 1858 are not applicable, being only void-

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(*u*) *Sikher Chund v. Dulputty Singh*, I. L. R. 5 Calc. 363. See also, In the matter of the petition of *Shrish Chunder Mookhopadhyay*, I. L. R. 6 Calc. 161.

(*v*) In the matter of the petition of *Nazirun*, I. L. R. 6 Calc. 19.

(*w*) *Sheo Nunulun Singh v. Mussamut Ghunsam Kooeree*, 21 W. R. 143; *Gourah Koeri v. Gujadhur Purshad*, I. L. R. 5 Calc. 219; *Hoolash Kooer v. Kassee Proshad*, I. L. R. 7 Calc. 369.

(*x*) *Shivji Hasam v. Datu Manji Khoja*, 12 Bom. H. C. 281; *Guracharya v. Svamirayacharya*, I. L. R. 3 Bom. 431.

(*y*) *Babaji v. Sheshgiri*, I. L. R. 6 Bom. 593.

able and not void (z) may be ratified by the minor after attaining his full age (a). If, however, the minor immediately upon his attaining his full age sells an estate previously mortgaged by his guardian, no subsequent ratification by the minor of the guardian's act will be of any avail (b).

Mere delay on the part of one who has recently attained majority, in repudiating an act of his guardian, cannot be treated as ratification of the act, and is no bar to a suit to set it aside, so long as the delay falls short of the period prescribed by the Limitation Act (Act XV of 1877) (c).

Without such ratification, money advanced to a guardian for what the Court does not consider to be for the minor's benefit, as for example, money advanced to carry on excessive litigation, will be considered as having been obtained by the guardian on his own personal responsibility (d).

But if the money received by the guardian was really applied to the minor's benefit, the latter, before he can recover possession, must refund to the mortgagee or purchaser the money received and applied to his advantage with interest (e). And when the minor had, shortly before reaching majority, assented to the sale by the guardian, the Court declined (in a suit brought by him when of full age) to set

(z) *Prosonna Nath Roy Chowdry v. Afzolonnessa Begum*, I. L. R. 4 Calc. 523 (cf. p. 525).

(a) *Saudut Alee Khan v. Khajah Aleemoollah*, S. D. A. 1853, p. 494; *Prosonnokoormar Bural v. Chowdree Sajudoor Ruhman*, S. D. A. 1853, p. 525.

(b) *Lallah Rawuth Lal v. Chadee Thuthara*, S. D. A. 1858, p. 312.

(c) Sec. 7. See *Rajnarain Deb Chowdhry v. Kassee Chunder Chowdhry*, 10 B. L. R. 324.

(d) *Nawab Syud Ashrufooddeen Alee Khan v. Mussumat Shama Soonderee Dasse*, S. D. A. 1853, p. 531.

(e) *Muthoora Doss v. Kanoo Beharee Singh*, 21 W. R. 287. See also *Bai Kesar v. Bai Ganga*, 8 Bom. H. C. (A. C. J.) 31; *Kuvarji v. Moti Haridas*, I. L. R. 3 Bom. 234.

the sale aside except on the terms of his refunding the amount actually received (*f*).

But a mortgage made without the sanction of the Court by a guardian who has obtained a certificate under Act XL of 1858 is, under section 23 of the Indian Contract Act, (Act IX of 1872) void *ab initio*, since its object is of such a nature that if permitted it would defeat the provisions of section 18 of Act XL of 1858 (*g*). A minor cannot, therefore, ratify such a mortgage made by his guardian (*h*).

One who purchases land from a minor is not, merely by virtue of his purchase, entitled to sue to set aside a mortgage previously made by the minor. Such a mortgage is to be deemed valid until avoided by some distinct act of the minor on his attaining majority (*i*).

The powers of a guardian under the Mahomedan law would appear to be very similar to those of a Hindu guardian. Thus where the aunt of certain minors who was in possession of certain real property on her own account and on account of the minors, sold the property in good faith and for valuable consideration in order to liquidate ancestral debts and to meet pressing necessity for the benefit of the minors, it was held by the Allahabad High Court that under Mahomedan law, and according to justice, equity, and good conscience, the sales were binding on the minors (*j*).

But it would seem that under Mahomedan law a guardian may sell the property of a minor where a very clear

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(*f*) *Paran Chandra Pal v. Karunamayi Dasi*, 7 B. L. R. 90; S. C. 15 W. R. 268.

(*g*) *Chimman Singh v. Subran Kuar*, I. L. R. 2 All. 902.

(*h*) *Mauji Ram v. Tara Singh*, I. L. R. 3 All. 852.

(*i*) *Hari Ram v. Jitan Ram*, 3 B. L. R. (A. C. J.) 426; S. C. 12 W. R. 378.

(*j*) *Hasain Ali v. Mehdi Husain*, I. L. R. 1 All. 533.

advantage is thereby to be gained for the minor, as well as when the case is one of urgent necessity (*k*).

Though a minor is incapable of executing a mortgage of his property so as to bind himself, he may apparently become a mortgagee, and the mortgagor cannot put forward the minority of the mortgagee as a plea against the validity of the contract (*l*).

The principles applicable to alienations of the property of a ward by his guardian or manager are also generally applicable to alienations by an executor or manager appointed by the will of a Hindu or Mahomedan, which has not been proved under the Hindu Wills Act 1870 (*m*), or the Probate and Administration Act 1881 (*n*).

The Hindu executor of a deceased Mahomedan borrowed money to pay off a debt for which certain property belonging to the testator's estate was about to be sold. As security for the money so borrowed, he gave a mortgage of certain property belonging to the estate. The mortgagee having sued on his mortgage bond, the parties beneficially interested disputed the mortgage on the ground that the loan was not *necessary*, or contracted in order to save the estate, inasmuch as at the time it was made, a large amount of money was in the hands of the executor. It was held, on appeal to the High Court (*o*), that even if the executor had funds in hand with which he might have paid off the original debt without borrowing from the plaintiff, that fact would not invalidate the plaintiff's claim against the estate, unless there were good reason to infer that he knew

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(*k*) *Mussamut Bukshan v. Mussamut Maldai Kooeri*, 3 B. L. R. (A. C. J.) 423. See also Tagore Law Lectures 1877 (Trevelyan) 341.

(*l*) *Behari Lal v. Beni Lal*, I. L. R. 3 All. 408 (cf. p. 411).

(*m*) Act XXI of 1870.

(*n*) Act V of 1881.

(*o*) *Kalee Narain Roy Chowdhry v. Ram Coomar Chand*, W. R. 1864, p. 99.

of these funds, or might have known of them if he had exercised ordinary diligence on the point.

In another case, a mortgage granted by the executor of a Hindu was set aside and declared null and void as against the heirs (*p*). The executor, Doorgapersad, in borrowing the money and granting the mortgage, acted contrary to the provisions of the will of the testator: and the mortgagees in lending the money made no sufficient inquiries as to the circumstances under which the executor was contracting the loan. The Court said,—“Under the will, Doorgapersad had no right to create this mortgage. Although Doorgapersad became the ‘attorney’ or executor under the will of Rajmohun (the testator) he had not, according to Hindu law, the same power over the estate of Rajmohun, movable and immovable, which an executor would have over leasehold estate according to English law. We think that according to Hindu law, an *attorney* or executor under a will, has no greater power over immovable estate than a manager,—which, according to the decision of the Privy Council in the case of *Hunoomanpersaud Panday*, is a limited and qualified power. And further, we are of opinion that the general power of a manager under a will may be restricted by the will, and that the manager is bound to act according to the directions in the will. If, therefore, Doorgapersad had the power to mortgage for specific purposes, it would have been the duty of the lender to inquire into the circumstances under which the estate was about to be mortgaged, and whether the executor had authority under the will to effect such a mortgage” (*q*).

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(*p*) *Sreemutty Deeno Moyee Dossee v. Tarachurn Coondoo Chowdhry*, 3 W. R. (Misc.) 7 (*note*). See also *Sreemutty Dassee v. Tarachurn Coondoo Chowdhry*, Bourke, 48 (Ap.).

(*q*) And see also *Srimati Jaykali Debi v. Shibnath Chatterjee*, 2 B. L. R. (O. C. J.) 1; *Gopalnarain Mozoomdar v. Muddomutty Guptaee*, 14 B. L. R. 21 (cf. p. 46); *Lallubhai Bapubhai v. Mankuvar-*

An executor, however, who has obtained probate, or an administrator who has got letters of administration with the will annexed, under the Probate and Administration Act (Act V of 1881) (*r*) has much larger powers than the executor of the will of a Hindu or Mahomedan, who does not take the benefit of that Act.

Under this Act the executor or administrator of a deceased Hindu, Mahomedan or Buddhist, or other person referred to in the Act, is the legal representative of the deceased for all purposes, and all the property of the deceased person vests in him as such (*s*). He can dispose of the property of the deceased, either wholly or in part, in such manner as he thinks fit, but he must, except when specially exempted from the necessity of doing so by the Court which granted the probate or letters of administration, first obtain the consent of the Court to the disposal (*t*). But nothing in the Act vests in an executor or administrator any property of a deceased person which would otherwise have passed by

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*bai*, I. L. R. 2 Bom. 388 (cf. p. 406); and *Chetty Colum Comora Vencatachella Reddyer v. Rajah Rungasawmy Streemunth Jyengar Bahadoor*, 8 Moore's I. A. 319 (cf. p. 323). For the position of a *de facto* manager in a case in which probate is subsequently granted, see *Prosunno Chunder Bhattacharjee v. Kristo Chytunno Pal*, I. L. R. 4 Cal. 342.

(*r*) The provisions of this Act, so far as the powers of executors and administrators are concerned, are identical, save on the one point as to the necessity for obtaining the Court's consent to alienations (see sec. 90 and note (*t*) *infra*) with those conferred on executors and administrators with the will annexed under the provisions of the Hindu Wills Act (Act XXI of 1870) which this Act supersedes.

(*s*) Act V of 1881, s. 4.

(*t*) *Ib.* s. 90. Under Act X of 1865, s. 269, which was made applicable to Hindu Wills by the Hindu Wills Act (Act XXI of 1870), no such consent was necessary. For the extent of the power to mortgage conferred on executors, by s. 269 of Act X of 1865, see *Seale v. Brown*, I. L. R. 1 All. 710.

survivorship to some other person (*u*), or validates any testamentary disposition which would otherwise have been invalid, or invalidates any such disposition which would otherwise have been valid or deprives any person of any right of maintenance to which he would otherwise have been entitled (*v*).

According to the Mitakshara and Mithila law (*w*) the alienation of joint undivided property is invalid, without the assent of all the sharers, unless made under such necessity or other special circumstances as make it binding on all the sharers. Thus a mortgage of joint property by three sharers, one of whom was a minor, was held bad as against the two adult proprietors as well as against the minor (*x*). So also, a mortgage of joint property by the *kurta* (an elder brother) during the minority of a brother, or without the consent of those brothers who were of age (*y*): and by a father of a joint Hindu family during the minority of his sons, or without their consent if of full age (*z*).

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(*u*) Act V of 1881, sec. 4.

(*v*) *Ibid.* sec. 148. *cf.* Act XXI of 1870, sec. 3.

(*w*) The Mithila law is very similar to the law of the Mitakshara—see *Girdharee Lall v. Kantoo Lall*, L. R. 1 I. A. 321 (*cf.* p. 329); S.C. 14 B. L. R. 187 (*cf.* p. 194); and for the purposes of this treatise, they are dealt with as being substantially the same. See also *Bhugwandeem Doobey v. Myna Bae*, 11 Moore's I. A. 487 (*cf.* p. 507.)

(*x*) *Mussumut Roopna v. Ray Reotee Rumeen*, S. D. A. 1853, p. 344. See also *Kooldeep Narain v. Rajbunsee Kowur*, S. D. A. 1847, p. 557; and *Sheo Surrun Misser v. Sheo Sohail*, 4 Sel. Rep. 158.

(*y*) *Doe d. Brijogopee Dabee v. Seeboosondery Dabee*, Fulton's Rep. 368, note (*a*). See also *Sheo Persaud Jha v. Gunga Ram Jha*, 5 W. R. 221; *Cazee Oahud Buksh v. Bindoo Bashinee Dossee*, 7 W. R. 298; *Baboo Beer Kishore Sukhye Singh v. Baboo Hur Bullub Narain Singh*, 7 W. R. 502.

(*z*) *Motee Lall v. Mitterjeet Singh*, 6 Sel. Rep. 71. See also *Mussumut Roopna v. Ray Reotee Rumeen*, S. D. A. 1853, p. 344; *Sitanath Koer v. Land Mortgage Bank of India*, I. L. R. 9 Calc. 888



Under the head of alienations which are good because made from necessity may be ranked those made for the support of the family, for the services of religion (a), for the payment of Government revenue, or for any 'pressing need.' Where decrees obtained by creditors were in execution against the father of a family, and the ancestral property had been advertised for sale in satisfaction of these decrees, and the father had been fined and was in jail under a criminal prosecution, it was considered that the necessity of the case justified an alienation of part of the property, in order to raise money to pay the fine imposed on the father, and to save the remainder of the estate from sale (b). But only so much of the property should be sold as is sufficient to meet the claim: and if a larger portion is sold, it must be shewn by the purchaser that the money required to pay off the claim could not be raised otherwise (c). This last rule, however, does not apply to cases in which the excess is comparatively small (d). Thus in one case the Privy Council said that it was not because there was a small portion which was not accounted for, that the son had a right to turn out the *bond fide* purchaser who gave value for the estate (e).

In a case in which the ostensible purpose of the loan was

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(cf. p. 897), and compare the principles laid down in the judgment in *Suraj Bunsî Koer v. Sheo Persad Singh*, I. L. R. 5 Calc. 148; S. C. L. R. 6 I. A. 88.

(a) See *Gopal Ohand Punde v. Baboo Kunwar Singh*, 5 Sel. Rep. 24.

(b) *Luchmun Koor v. Mudaree Lall*, S. D. A. N. W. P. 1850, p. 327, See also *Radhey v. Baboo Bhurtpershad*, S. D. A. N. W. P. 1851, p. 414.

(c) *Ameerut Misser v. Dabee Persaud*, S. D. A. 1861, vol. 1, p. 193.

(d) *Baboo Luchmeedhur Singh v. Elkal Ali*, 8 W. R. 75. See also *Phool Chund Lall v. Rughobuns Suhaye*, 9 W. R. 108.

(e) *Girdharee Lall v. Kantoo Lall*, L. R. 1 I. A. 321 (cf. p. 332); S. C. 14 B. L. R. 187 (cf. p. 197.)

to pay off Government revenue, the Court ruled that in order to render such a loan binding upon those who had reversionary interests in the property, it must be satisfactorily proved that the loan was at the time absolutely necessary from failure of the resources of the estate itself, and was not raised through the caprice or extravagance of the proprietor (*f*). Latterly, however, the general principles laid down in the case of *Hunoomanpersaud Panday* (*g*) have usually been acted on, and it has been held that where the debt has been contracted really under circumstances of pressure and for the benefit of the estate, the lender's title is good and is not affected by the waste or mismanagement of the borrower (*h*).

It has been held by the High Court at Madras that a mortgage of the family house made by the father, the managing member of a joint Hindu family, for the purpose of paying off a previous mortgage debt which had been incurred principally in order to meet the expense of improving the family house and for the purpose of completing those improvements, bound the sons of the mortgagor. Although it was not a matter of family necessity to improve the house, still the improvements had been made by the father in the *bonâ fide* exercise of his discretion and for the benefit of the estate, and the family had had the benefit (*i*).

The High Court at Bombay has ruled that "family necessity" is an expression that must receive a reasonable construction, and the head of the family and those dealing with him

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(*f*) *Damoodur Mohapattur v. Birjo Mohapattur*, S. D. A. 1858, p. 802.

(*g*) 6 Moore's I. A. 393.

(*h*) *Deotaree Mahapattur v. Damoodhur Mahapattur*, S. D. A. 1859, p. 1643. See also *Sheosuhaye Singh v. Gobind Roy*, S. D. A. 1859, p. 376; *Nuffer Chunder Banerjee v. Guddadhur Mundle*, 3 W. R. 122.

(*i*) *Ratnam v. Govindarajulu*, I. L. R. 2 Mad. 339.

must, in the interest of the family itself, be supported in transactions which, though in themselves diminishing the estate, yet prevent or tend to prevent still greater losses. A reasonable latitude too must be allowed for the exercise of a manager's judgment, especially in the case of a father, though this must not be extended so as to free the person dealing with him from the need of all precautions where a minor son has an interest in the property (j).

Many important cases bearing on this subject have been decided within the last few years, and the matter has been much discussed.

According to the true notion of an undivided Hindu family, no individual member of a family, whilst it remains undivided, can predicate of the joint and undivided property that he, any particular member, has a certain definite share. No individual member of an undivided family could go to the place of receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and there dealt with according to the modes of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with: and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided (k).

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(j) *Babaji Mahadaji v. Krishnaji Devji*, I. L. R. 2 Bom. 666.

(k) See *Appovier v. Rama Subba Aiyan*, 11 Moore's I. A. 75 (cf. p. 89). Compare also *Bannoo v. Kashee Ram*, I. L. R. 3 Calc. 315;

So long as a Hindu family under the law of the Mitakshara is living in the joint enjoyment of the family property, without having come to an actual partition among themselves of that property, or an ascertainment and partition of their rights in it, so long no member of the family has, according to the strict theory of a joint and undivided Hindu family, any such separate proprietary right in the property as he can alienate or encumber. He has a proprietary right, but it lacks the incident of dominion (*l*). Under such circumstances, the property belongs to all the members of the family jointly, and no one of the individual members has any share in it which he can deal with as his own: and it can be mortgaged or sold only by the joint act of all the members, or by the *kurta* or manager of the family in the event of there being such a case of family necessity as will, in the eye of the law, invest the *kurta* with authority to alienate as the agent of all. A son acquires by birth a share equal to that of his father in ancestral property, and can during his father's life compel a partition of such property: the father cannot alienate the property except for certain beneficial purposes, and the son may sue to set aside alienations improperly made (*m*).

But ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. Unless the debt

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*Radha Churn Dass v. Kripa Sindhu Dass*, I. L. R. 5 Calc. 474; *Adi Deo Narain Singh v. Dukharan Singh*, I. L. R. 5 All. 532.

(*l*) *Baldeo Das v. Sham Lal*, I. L. R. 1 All. 77.

(*m*) *Sadabart Prasad Sahu v. Foolbash Koer*, 3 B. L. R. (F. B.) 31; *Raja Ram Tewary v. Luchmun Pershad*, 8 W. R. 15 (F. B.); *Modhoo Dyal Singh v. Golbur Singh*, 9 W. R. 511 (F. B.); *Mahabeer Persad v. Ramyad Singh*, 12 B. L. R. 90; *Jugdeep Narain Singh v. Deendial*, 12 B. L. R. 100. See also *Laljeet Singh v. Rajcoomar Singh*, 12 B. L. R. 373; and *Suraj Bunsu Koer v. Sheo Persad Singh*, I. L. R. 8 Calc. 148 (cf. p. 166); S.C. L. R. 6 I. A. 88 (cf. p. 102).

is of such a nature that the son is under no obligation to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired, by the creator of the debt. It being a pious duty on the part of the son to pay his father's debts, the ancestral property, in which the son, as the son of his father, acquires an interest by birth, is liable to the father's debts. Further the obligation of a son to pay his father's debts, unless contracted for an immoral purpose, affords of itself a sufficient answer to a suit brought by a son either to impeach sales by private contract for the purpose of raising money in order to satisfy pre-existing debts, or to recover property sold in execution of decrees of Court. And therefore where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted (n).

Though these rulings have been adopted and followed in numerous cases from all the Presidencies (o), there has been

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(n) *Suraj Bunsî Koer v. Sheo Persad Singh*, I. L. R. 5 Cal. 148 (cf. p. 171); S.C. L. R. 6 I. A. 88 (cf. p. 106), explaining and affirming *Girdharee Lall v. Kantoo Lall*, L. R. 1 I. A. 321; S.C. 14 B. L. R. 187.

(o) For some of them see *Muddun Gopal Lali v. Mussamut Gownbutty*, 15 B. L. R. 264; *Budree Lall v. Kantee Lall*, 23 W. R. 260; *Mussamut Anooragee Kooer v. Mussamut Bhugobutty Kooer*, 25 W. R. 148; *Ram Sahoy Singh v. Mohabeer Pershad*, 25 W. R. 185; *Mussamut*

much discussion, and some conflict of opinion on various points connected with their application. It would be beyond the scope of this work to attempt to consider and distinguish between these cases. The subject will be found discussed in Mr. Mayne's treatise on Hindu Law and Usage (p), where it is observed (q) that "it must be owned that the principle of the Mitakshara that sons have a right to control their father in the alienation of the family property is almost nullified by the other principle that they are bound after his death to pay his debts, even though contracted without necessity, and by the logical extension of that principle, recently laid down by the Privy Council, that the father is entitled to sell the family property in order to pay off his own debts,

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*Omuthoonnissa v. Puresmun Narain Singh*, 25 W. R. 202; *Shah Wajed Hossein v. Baboo Nankoo Singh*, 25 W. R. 311; *Luchmi Dai Koori v. Asman Singh*, I. L. R. 2 Calc. 213; *Adurmoni Deyi v. Chowdhry Sib Narain Kur*, I. L. R. 3 Calc. 1; *Luchmun Dass v. Giridhur Chowdhry*, I. L. R. 5 Calc. 855 (F. B.); *Goburdhon Lall v. Singesur Dutt Koer*, I. L. R. 7 Calc. 52; *Gunga Prosad v. Ajudhia Pershad Singh*, I. L. R. 8 Calc. 131; *Darsu Pandey v. Bikarmajit Lal*, I. L. R. 3 All. 125; *Ponnappa Pillai v. Pappuvayyengar*, I. L. R. 4 Mad. 1 (F. B.); *Gangulu v. Ancha Bapulu*, I. L. R. 4 Mad. 73 (F. B.), affirmed by the Privy Council in *Muttayan Chetti v. Sangili Vira Pandin Chianatambiar, Zamindar of Sivagiri*, I. L. R. 6 Mad. 1 (P. C.); *Sitaramasami v. Midatana*, I. L. R. 6 Mad. 400; *Arunachala Chetti v. Munisami Mudali*, I. L. R. 7 Mad. 39; *Narayanacharya v. Narso Krishna*, I. L. R. 1 Bom. 262; *Lakshman Ramachandra Joshi v. Satyabhamabai*, I. L. R. 2 Bom. 494 (cf. p. 498); *Kastur Bhavani v. Appa*, I. L. R. 5 Bom. 621; *Sadashiv Dinkar Joshi v. Dinkar Narayan Joshi*, I. L. R. 6 Bom. 520; *Fakirchand Motichand v. Motichand Hurruckchand*, I. L. R. 7 Bom. 438 (cf. p. 440). The later cases are mainly concerned in reconciling the decision of the Privy Council in the case of *Deendyal Lal v. Jugdeep Narain Singh*, I. L. R. 3 Calc. 198 with the other cases.

(p) 3rd Edition, paras. 280A to 280B and 302.

(q) Para. 302.

which were not contracted for the benefit of the family, but which the sons would be under a moral obligation to discharge."

According to the Mitakshara, a son cannot prevent his father from alienating property which the latter has inherited collaterally. The restriction upon the father's power applies only to property which has come from the grandfather (father's father) (*r*). And under the law which prevails in the Mithila country,—probably also under the Mitakshara,—the father may at his pleasure alienate or dispose of self-acquired property (*s*).

Although it may not be necessary for the mortgagee or purchaser to see to the application of the money paid by him, still it is necessary for him to make due inquiry as to the necessity to borrow or sell (*t*).

Where, therefore, a father of a joint Hindu family, sold the ancestral property, during the minority of his son, in order to raise money for immoral purposes, and the purchaser, though he acted in good faith and gave value for the property, did not make reasonable inquiry as to the circumstances under which the sale was being made, it was held by a majority of a Full Bench of the Allahabad High Court that the sale was not valid even to the extent of the father's share (*u*).

When ancestral joint property is put up for sale in execution of a decree of Court, the purchaser under the execu-

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(*r*) *Baboo Nund Coomar Lall v. Moulvie Rozeeooddeen Hossein*, 10 B. L. R. 183.

(*s*) *Raja Bishen Perakash Narain Singh v. Bawa Misser*, 12 B. L. R. 430 (P. C.); *Muddun Gopal Thakoor v. Ram Buksh Pandey*, 6 W. R. 71; *Sital v. Madho*, I. L. R. 1 All. 394. See also *Gunga Prosad v. Ajudhia Pershad Singh*, I. L. R. 8 Calc. 131.

(*t*) *Mussamut Nowruttun Koor v. Baboo Gouree Dutt Singh*, 6 W. R. 193.

(*u*) *Chamaili Kuar v. Ram Prasad*, I. L. R. 2 All. 267 (F. B.)



tion is not bound to go back beyond the decree in order to ascertain whether the Court was right in giving the decree, or having given it, in putting up the property for sale under an execution upon it. The purchaser need only satisfy himself that there is a decree against certain defendants, which is binding on them, and that the property sold is property liable to satisfy the decree. Having inquired into that, and having *bonâ fide* purchased the estate under the execution, his title is good (v).

And the principle of this decision has been affirmed by the Privy Council in a more recent case, in which it was held that the purchasers of joint ancestral property under a sale in execution of a decree for the father's debt, being strangers to the suit, if they have not notice that the debt was contracted for immoral purposes, are not bound to make inquiry beyond what appears on the face of the proceedings (w).

But a decree-holder, who purchases in execution of his own decree, cannot be considered to be in the favorable position of a purchaser for valuable consideration without notice (x).

There have been several, at first sight conflicting, decisions of the Privy Council on the subject of the extent to which a decree obtained against the father or other member of a joint family will benefit the person who relies on it. The ruling of that tribunal in *Muddun Thakoor v. Kantoo*

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(v) *Girdharee Lall v. Kantoo Lall*, L. R. 1 I. A. 321 (cf. p. 334); S.C. 14 B. L. R. 187 (cf. p. 199).

(w) *Suraj Bunsî Koer v. Sheo Persad Singh*, I. L. R. 5 Calc. 148; S.C. L. R. 6 I. A. 88. See also *Sivasankara Mudali v. Parvati Anni*, I. L. R. 4 Mad. 96 (F. B.) See also many of the cases cited above in note (o) page 56 *supra*.

(x) *Ramphul Singh v. Deg Narain Singh*, I. L. R. 8 Calc. 517 (cf. p. 522), following *Gonesh Pandey v. Dabee Doyal Singh*, 5 C. L. R. 36.

*Lall* (y) clearly established the proposition that a decree, properly obtained against the father of a joint family, can be executed by sale of the ancestral estate, and the interest of the sons as well as of the father will be bound by it. But in the later case of *Deendyal Lal v. Jugdeep Narain Singh* (z) the Judicial Committee made certain observations, which would at first sight seem to lay down principles inconsistent with those on which its previous ruling was based.

This was a case in which a son sued to recover possession of a certain share of the family property which had been purchased by the defendant Jugdeep Narain Singh at an execution sale under a decree on a bond given to him by the plaintiff's father, and the Judicial Committee observed that, "whatever may have been the nature of the debt, the purchaser cannot be taken to have acquired by the execution sale more than the right, title and interest of the judgment-debtor. If he had sought to go further, and enforce his debt against the whole property, and the co-sharers therein, who were not parties to the bond, he ought to have framed his suit accordingly, and have made these co-sharers parties to it. By the proceedings which he took he could not get more than what was seized and sold in execution, viz., the right, title and interest of the father." (a)

However, in the later case of *Suraj Bunsî Koer v. Sheo Persad Singh* (b), the Privy Council re-affirmed the principle laid down by it in *Muddun Thakoor's* case, (c) whilst in the still later case of *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh* (d), it applied the same principle to

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(y) L. R. 1 I. A. 333 ; S.C. 14 B. L. R. 187.

(z) I. L. R. 3 Calc. 198.

(a) *Ibid.* (cf. p. 204).

(b) I. L. R. 5 Calc. 148 ; S.C. L. R. 6 I. A. 88.

(c) L. R. 1 I. A. 333 ; S.C. 14 B. L. R. 187.

(d) L. R. 6 I. A. 233.

the case of any member, and not merely the father, of a joint family who is sued for a family debt, for it held that, where decrees had been obtained against a member of a joint Hindu family as heir of his grand-father to recover a family debt, the entire family property was saleable under these decrees.

These cases have been the subject of much comment, and considerable difficulty has been felt, especially at Calcutta (e), as to how the decision in *Deendyal's* case is to be harmonized with the other rulings above referred to. But as observed in a late Bombay case (f) "the tendency of recent judgments has been to consider whether it was intended to sue the father in his representative capacity or not; and if such was the intention, to hold the son's interest bound, though the decree have been made against the father alone, and only his right, title and interest expressly specified as sold in execution." And in a very recent Calcutta case (g) O'Kinealy, J., in delivering judgment, stated the law in the following general terms (h):—  
 "When one member of a Mitakshara family contracts a

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(e) See *Pursid Narain Sing v. Honooman Sahay*, I. L. R. 5 Calc. 845; *Luckman Dass v. Giridhur Chowdhry*, I. L. R. 5 Calc. 855 (F. B.); *Laljee Sahoy v. Fakeer Chand*, I. L. R. 6 Calc. 135; *Upooroop Tewary v. Lalla Bandhjee Suhay*, I. L. R. 6 Calc. 749; *Ramphul Singh v. Deg Narain Singh*, I. L. R. 8 Calc. 517.

(f) Per Latham, J., in *Fakirchand Motichand v. Motichand Hur-ruckchand*, I. L. R. 7 Bom. 438 (cf. p. 445); and see *Umbica Prosad Tewary v. Ram Sahay Loll*, I. L. R. 8 Calc. 898; *Sheo Prosad v. Jung Bahadoor*, I. L. R. 9 Calc. 389; *Ramdut Sing v. Mahendur Prasad*, I. L. R. 9 Calc. 452; *Baso Koor v. Hurry Dass*, I. L. R. 9 Calc. 495.

(g) *Jumoon Persad Singh v. Dij Narain Singh*, I. L. R. 10 Calc. 1.

(h) *Ibid.* cf. p. 7. It is to be noted, however, that this suit was one by a son to obtain possession of certain property sold in execution of a decree against his father. The statement of the law made by O'Kinealy, J., was therefore wider than was needed for the decision of the case before the Court.

debt, which is binding not only on the person executing the contract, but on the other members of the joint family to which he belongs, the creditor may deal with them in either of two ways. He may elect to treat the debt as a personal debt, and confine his suit to the person who actually contracted it. In such a suit he obtains, and only obtains, a mere personal decree not binding on the family, and in execution of the decree he merely sells the right, title and interest of the debtor, which in this case is the person who actually borrowed the money. Or he may treat the borrower as acting for the family, sue him as representing the joint family, and when he has obtained a decree against the borrower in that capacity, proceed to sell the right, title and interest of the judgment-debtors, *i.e.*, all the members of the joint family or any of them. *Deendyal's* case is an example of the one kind of case, and *Bissessur Lall Sahoo v. Maharaja Luchmessur Singh* (i) is an example of the other."

In the N. W. P. a Full Bench has distinguished between *Deendyal's* case and that of *Bissessur Lal Sahoo v. Maharaja Luchmessur Singh*, and held, that the latter decision is an authority for holding that when a suit is brought to recover a family debt against a member of a joint Hindu family, it may be assumed that the defendant is sued as the representative of the family, and also for holding that, when looking at the substance of the cases and the decrees, the latter are substantially decrees in respect of a joint debt of the family, and against the representatives of the family, they may be properly executed against the family property. In each case the Court has to ascertain what the intention and operation of the decree and execution proceedings substantially are, and to give effect to them (j).

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(i) L. R. 6 I. A. 233.

(j) *Ram Narain Lal v. Bhawani Prasad*, I. L. R. 3 All. 443; followed in *Phul Chand v. Man Singh*, I. L. R. 4 All. 309; *Phul Chand v. Lachmi Chand*, I. L. R. 4 All. 486; compare also the fol-

In the Madras Presidency it has been ruled that, where there has been a decree against the father for debt, and the right, title and interest of the father in ancestral property has been sold under the decree, and the purchaser has been placed in possession of the entire mass of the property advertised for sale in place of the mere interest of the judgment-debtor in the property, which was all that was advertised to be sold, a son desiring to obtain his share in the property, which by an error in execution has thus got into the hands of the purchaser, cannot avail himself of the decision of the Judicial Committee in *Deendyal Lal v. Jugdeep Narain Singh* (k), and is not entitled to recover his share unless he can shew that the debt for which a decree was obtained against the father without joining the son was an illegal or immoral debt (l). But a different rule would seem to prevail, when the decree has been against a simple coparcener, and not a father (m).

In Bombay it has been held, that though there may be some difficulty in reconciling the view expressed in

lowing earlier cases in which the same principles were apparently recognized, *Deva Singh v. Ram Manohar*, I. L. R. 2 All. 746; *Bika Singh v. Lachman Singh*, I. L. R. 2 All. 800; *Ram Sevak Das v. Raghubar Rai*, I. L. R. 3 All. 72; *Radha Kishen Man v. Bachhaman*, I. L. R. 3 All. 118; *Gaya Din v. Raj Bansi Kuar*, I. L. R. 3 All. 191; and *Nanhak Joti v. Jaimangal Chaubey*, I. L. R. 3 All. 294.

(k) L. R. 4 I. A. 247; S.C. I. L. R. 3 Cal. 198.

(l) *Per Innes, J.*, in *Valliyammal v. Katha Chetti*, I. L. R. 5 Mad. 61, explaining *Ponnappa Pillai v. Pappuvayyangan*, I. L. R. 4 Mad. 1 (F. B.). See also *Gopalasami Pillai v. Chohalingam Pillai*, I. L. R. 4 Mad. 320; *Srinivasa Nayudu v. Yelaya Nayudu*, I. L. R. 5 Mad. 251; but compare *Venkatasami Naik v. Kuppaiyan*, I. L. R. 1 Mad. 354; *Subbayyan v. Rупpa Nagasami Ayyan*, I. L. R. 6 Mad. 155.

(m) See *Armugam Pillai v. Sabapathi Padiachi*, I. L. R. 5 Mad. 12; *Subramaniyayyan v. Subramaniyayyan*, I. L. R. 5 Mad. 125 (F. B.); *Dasaradhi Ravulo v. Joddumoni Ravulo*, I. L. R. 5 Mad. 193; compare also *Saravana Tevan v. Muttayi Ammal*, 6 Mad. H. C. 371 (cf. p. 386); *Pareyasamy v. Saluckai Tevar*, 8 Mad. H. C. 157.

*Deendyal's* case as to the effect of the sale of a father's right, title and interest with the decision of the Judicial Committee in *Girdharee Lall's* case, there has never been any difference of opinion as to the effect of a sale under a decree obtained against the manager of a Hindu undivided family alone, when that manager is not the father of the other co-sharer or co-sharers. In such a case the purchaser cannot get more than was seized, and sold in execution, namely, the right, title and interest of the co-sharer against whom the decree was obtained (n).

Where money was borrowed by a near relative of a joint Hindu family (holding part of the ancestral property and appearing before the world as a coparcener of the family), to pay a *bonâ fide* ancestral debt, the loan was held to be a family debt, not merely a debt for which the borrower was personally liable (o).

Those who dispute a conveyance of this kind, can do so only by bringing a suit to have it declared illegal and void, on the ground of the property being ancestral : and a suit, brought by sons in their father's lifetime, for possession as proprietors on account of illegal alienation by their father, will not be entertained. A son's proprietary right in ancestral property was formerly held not to arise until after the death of his father (p), unless the father had expressly relinquished his rights (q). Subsequently when,

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(n) *Maruti Narayan v. Lilachand*, I. L. R. 6 Bom. 564 ; *Kisan-sing Jivansing Pardesi v. Moreshwar Vishnu Joshi*, I. L. R. 7 Bom. 91.

(o) *Buldeo Ram Tewaree v. Somessur Pauray*, 7 W. R. 490.

(p) *Peer Buksh Khan v. Ram Dass*, S. D. A. (N. W. P.) 1852 p. 311 ; *Pursun Sahoo v. Ramdeen Lall*, S. D. A. (N. W. P.) 1852, p. 365 ; *Radhey v. Baboo Bhurtpershad*, S. D. A. (N. W. P.) 1851, p. 414 ; *Ramdyalnarain Singh v. Syud Joolfeekur Hosein*, S. D. A. 1851, p. 352 ; *Petition No. 426 of 1855*, S. D. A. 1857, p. 67 ; *Chutter Dharee Lal v. Bikao Lal*, S. D. A. 1850, p. 282.

(q) *Byram Sing v. Seebsehai Sing*, 6 Sel. Rep. 65.

as has been shewn, it was decided that according to the Mitakshara law, a son acquires by birth a right in ancestral property, and can during his father's lifetime compel a partition of such property, it was held that the cause of action to the son accrues when the purchaser takes possession,—that a new cause of action does not upon the subsequent birth of a younger brother accrue either to the elder brother alone, or to him and the younger brother jointly,—and that a son cannot set aside alienations made before his birth (r).

But under the present law of Limitation (s), a suit by a Hindu governed by the Mitakshara law to set aside his father's alienation of ancestral property must be instituted within twelve years from the date of the alienation.

In the case of Hindus of the Bengal School, *i.e.*, who are governed by the law of the Dyabhaga, the son does not on birth acquire any interest in ancestral property held by the father. The father can dispose of his property, whether ancestral or self-acquired, at his pleasure. The son's interest in the property does not accrue till the death of the father: and therefore a suit by a son to set aside an alienation of ancestral property made by his father cannot be maintained (t).

The members of a joint Hindu family (Bengal School) agreed among themselves not to partition their estate, and that it should "continue in one joint undivided occupation as at present." It was held that this agreement did not prevent a co-parcener from alienating his share: and that a purchaser,

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(r) *Raja Ram Tewary v. Luchmun Pershad*, 8 W. R. 15 (F.B.) and the cases referred to *ante* pp. 55, 56, notes (m), (n) and (o).

(s) Act XV of 1877, Sch. 2, Art. 126; for the period of limitation, when the son is a minor at the date of the alienation, see *Ramphul Singh v. Deg Narain Singh*, I. L. R. 8 Calc. 517.

(t) For this reason no doubt Art. 126 of Sch. II of Act IX of 1871, has not been reproduced in Sch. II of Act XV of 1877.



at a sale in execution of a decree, of the share of one of the contracting parties, was not bound by the agreement (*u*).

The *kurta* or manager of a joint Hindu family may have power to mortgage the whole estate under certain circumstances. But he has not power to mortgage the share of one of the coparceners in order to pay off liabilities of that individual coparcener (*v*).

The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade (*w*). Therefore a mortgage of joint family property made by the managing member of a joint family, in order to obtain an advance necessary for the purposes of the family business, is binding on all the members of the partnership whether they be adults or minors (*x*).

The principles applicable to alienations by the manager of a joint Hindu family would seem to govern also the case of the holder of an impartible estate, when it is joint property, though their application is necessarily different.

(*u*) *Anand Chandra Ghose v. Prankisto Dutt*, 3 B. L. R. (o. c. j.) 14; *Ramdhone Ghose v. Anund Chunder Ghose*, 2 Hyde 97.

(*v*) *Gopalnarain Mozoomdar v. Muddomutty Guptee*, 14 B. L. R. 21 (cf. p. 51).

(*w*) *Ramlal Thakursidas v. Lachmichand Muniram*, 1 Bom. H. C. App. 51.

(*x*) *Bemola Dossee v. Mohun Dossee*, I. L. R. 5 Calc. 792. See also *Trimbak Anant v. Gopalshet M. Mahadu*, 1 Bom. H. C. (a. c. j.) 27; *Johurra Bibee v. Sreegopal Misser*, I. L. R. 1 Calc. 470; *Sham Narain Singh v. Rughooburdial*, I. L. R. 3 Calc. 508. A different rule would seem to prevail in cases to which English law is applicable; see *Harrison v. The Delhi and London Bank*, I. L. R. 4 All. 437 (cf. p. 459), and the remarks of Wilson, J., in *Bemola Dossee v. Mohun Dossee*, I. L. R. 5 Calc. 792 (cf. p. 798). But see the opinion expressed by Mr. Justice Lindley as to the power of a partner to make an equitable mortgage, which is quoted approvingly by Garth, C.J., in the same case at pp. 804 *et seq.*, though it is opposed to the view adopted in *Fisher on Mortgage*, 3rd ed., p. 300.

It has been held that the holder for the time being of such an estate, though he is the absolute owner, has only a life interest, and therefore his acts or alienations are good for his life only, and not beyond it. At his death they are voidable at the option of his successor if made without consent or without necessity (*y*). A different rule was, however, laid down by the Privy Council in a late case which came up from Chutia Nagpur in the Bengal Presidency. It was there held that the owner of an estate which descends as an impartible inheritance is not, by reason of its impartibility, restricted to making grants or gifts enuring only for his life. The power of alienation resting upon the general law, inalienability, if existing, must depend upon family custom in this respect, and of such custom proof is required (*z*). But this ruling would seem to be applicable only where the parties are subject to the Dayabhaga, and a Division Bench of the Allahabad High Court has recently declined to follow it in a case where the Mitakshara was the law of the parties (*a*).

Where a son sues to recover property sold by his father on the ground that the sale was made under such circumstances as not to be binding on him, if it is proved to the satisfaction of the Court that the purchase-money was carried to the assets of the joint estate, and that the son had

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(*y*) *Gavuridevamma Garu v. Ramandora Garu*, 6 Mad. H. C. 93 (cf. p. 105); *Kotta Ramasami Chetti v. Bangari Seshama Nayanivaru*, I. L. R. 3 Mad. 145 (cf. p. 150); *Mana Vikraman v. Sundaran Pattar*, I. L. R. 4 Mad. 148 (cf. p. 149); *Bhavanamma v. Ramasami*, I. L. R. 4 Mad. 193 (cf. p. 197); *Naraganti Achammagaru v. Venkatachalapati Nayanivaru*, I. L. R. 4 Mad. 250 (cf. p. 266); for the powers of the *Karnavan* of a Malabar *Tarwad* to grant the mortgages known as *kanoms* and *ottis*, see *Tod v. P. P. Kunhamod Hajee*, I. L. R. 3 Mad. 169 (cf. p. 175).

(*z*) *Raja Udaya Aditya Deb v. Jadab Lal Aditya Deb*, I. L. R. 8 Calc. 199; S. C. L. R. 8 I. A. 248; see also *Anund Lal Singh Deo v. Maharaja Dheraj Gurood Narayun Deo*, 5 Moore's I. A. 82.

(*a*) *Bhawani Ghulam v. Deo Raj Kuari*, I. L. R. 5 All. 542.

the benefit of his share of it, the son cannot recover his share of the estate without refunding his share of the purchase-money. So, if it were proved that the sale was effected for the purpose of paying off a valid incumbrance on the estate, which was binding upon the son, and the purchase money was applied in freeing the estate from this incumbrance, the purchaser would be entitled to stand in the place of the incumbrancer, notwithstanding the incumbrance might be such that the incumbrancer could not compel the immediate discharge of it : and the decree for the recovery by the son of the ancestral property or of his share in it, as the case might be, would be to hold it subject to the incumbrance (b).

Where money has been advanced in good faith on a sale or mortgage which is subsequently set aside at the suit of a member of the joint family, the purchaser or mortgagee is usually deemed to be entitled in equity to a declaration that the property, the sale or mortgage of which is set aside, —or the share in it belonging to those who have received the benefit of his money,—shall remain charged with the repayment of the money paid by him. Where a father and his two sons, of whom one was a minor, owned certain ancestral property, the father borrowed Rs. 3,000 and gave a bond for it. Being afterwards sued on the bond, a decree was passed against him. Under that decree, the ancestral property was attached and sold, and the holder of the bond was the purchaser. The two sons then sued to set aside the execution sale and to recover possession, on the ground of no assent and no legal necessity. It was proved that there was no legal necessity for the loan, but that it was made with the consent of the son who had attained majority. The Court, in the interest of the minor, set aside the execution sale altogether : and ordered that the property should be restored

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(b) *Modhoo Dyal Singh v. Golbur Singh*, 9 W. R. 511. See also *Baboo Ram v. Gajadhur Singh*, N. W. P. (Agra) H. C. (F. B.) 86 ; *Oomedee v. Cheda Lall*, 2 N. W. P. (Agra) H. C. 264.

to the two sons for the joint family. But the decree also declared that, on recovery, the property should be held in defined shares, *i.e.*, one-third by the father, one-third by the elder son, and the remaining one-third by the minor: and that the shares of the father and of the elder son should be jointly and severally subject to the lien of the lender and purchaser for the repayment of Rs. 3,000 and interest (*c*).

On the necessity for a part only of the loan being established, the Court may order that the deed be set aside, and that the plaintiff do recover possession, upon his paying the amount taken up for purposes authorised by law, or that the deed be set aside only in proportion (*d*).

It has been ruled by a Full Bench of the Madras High Court that there is no legal presumption that a sale by a Hindu father is valid until the contrary is shewn. Where therefore a suit is brought against the father of an undivided Hindu family having an infant son for the specific performance of a contract to sell land, presumably ancestral, the Court, having thereby notice that the vendor's powers can be exercised without a breach of trust only where there exists a necessity sufficient in law to justify the sale, and that the infant son is entitled to interdict the sale, is bound to require the plaintiff to give some proof of the necessity for the sale (*e*).

In the Courts of the Madras and Bombay Presidencies, where for the most part the law of the Mitakshara prevails, it is held (contrary to the rule which prevails on this side of India) that one of several co-parceners in a

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(*c*) *Mahabeer Persad v. Ramyad Singh*, 12 B. L. R. 90. See *ante* pp. 46-48 as to the case of minors.

(*d*) *Rajaram Tewari v. Lachman Prasad*, 4 B. L. R. (a. c. j.) 118 (cf. p. 127).

(*e*) *Gurusami Sastrial v. Ganapathia Pillai*, I. L. R. 5 Mad. 337. The principle of this decision would appear to be equally applicable in the case of a mortgage.

Hindu undivided family may, without the assent of his co-parceners, sell, mortgage or otherwise alienate for valuable consideration, his share in the undivided family estate (*f*). A managing co-parcener, *e.g.* a father, cannot, however, alienate or charge the share of a minor co-parcener in ancestral property except for the purpose of providing for some family need, or for the clear benefit of the joint estate (*g*).

But a share in the undivided estate of a Hindu family may as well in Bengal and the N. W. P. as in Madras and Bombay be taken in execution under a judgment against the co-parcener to whom such share belongs, at the suit of his personal creditor, and the purchaser at such a sale acquires the right to compel a partition as against the other co-sharers which the judgment-debtor formerly possessed (*h*).

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(*f*) *Vasudev Bhat v. Venkatesh Sanbhav*, 10 Bom. H. C. 139, (in which all the authorities are referred to by *Westropp, C.J.*); *Fakirapa Bin Satyapa v. Chanapa Bin Chanmalapa*, 10 Bom. H. C. 162; *Virasvami Gramini v. Ayyasvami Gramini*, 1 Mad. H. C. 471; *Palanivelappa Kavundan v. Mannaru Naikan*, 2 Mad. H. C. 416; *J. Rayachariu v. J. V. Venkataramaniah*, 4 Mad. H. C. 60; *Yekeyamian v. Agniswarian*, 4 Mad. H. C. 307. See also *Lakshman Dada Naik v. Ramchandra Dada Naik*, I. L. R. 5 Bom. 48, as to alienations by gift or will. For the contrary law in Bengal and the N. W. P. see *Deendyal Lal v. Jugdeep Narain Singh*, I. L. R. 3 Calc. 198 (cf. p. 205); S.C. L. R. 4 I. A. 247 (cf. p. 251); *Suraj Bunsu Koer v. Sheo Persad Singh*, I. L. R. 5 Calc. 148 (cf. p. 166); S.C. L. R. 6 I. A. 88 (cf. p. 101); *Sadabart Prasad Sahu v. Foolbush Koer*, 3 B. L. R. (F. B.) 31; *Chamailli Kuar v. Ram Prasad*, I. L. R. 2 All. 267; *Rama Nand Singh v. Gobind Singh*, I. L. R. 5 All. 384.

(*g*) *Saravana Tevan v. Muttayi Ammal*, 6 Mad. H. C. 371; and see this case as to the *onus* of proof of necessity, and *bona fides*.

(*h*) See in addition to the Privy Council cases above cited, *Jallidar Singh v. Ram Lall*, I. L. R. 4 Calc. 723; *Rai Narain Dass v. Nownit Lal*, I. L. R. 4 Calc. 809; *Bika Singh v. Lachman Singh*, I. L. R. 2 All. 800; *Jogul Kishore v. Shib Sahai*, I. L. R. 5 All. 430; *Balaji Anant Rajadiksha v. Ganesh Janardan Kamati*, I. L. R. 5 Bom. 499.

In Bengal, a Hindu widow who has succeeded as heiress to the property of her deceased husband, cannot under the law of the Dyabhaga, and throughout India generally, a childless Hindu widow who has succeeded as heiress of her husband to property of which he died solely possessed cannot, under the law of the Mitakshara, make a mortgage or sale which will be valid after her death, of any portion of such property, except when the sale or mortgage is made on account of some necessity, as the providing for her own maintenance, or of some indispensable duty connected with her husband, such as the payment of his debts or acts designed for his spiritual benefit. In the Calcutta Sudder Court a mortgage by a Hindu widow was at one time held to be absolutely invalid, if not proved by the mortgagee to have been incurred for the purposes of her necessary maintenance, or for some indispensable duty (*i*). But the rule thus laid down went too far.

There has been much discussion and some variety of decision on the question of the exact nature of a Hindu widow's estate, and the extent of her powers to deal with it. Latterly, however, the principles laid down in the case of *Hunoomanpersaud Panday* (*j*) have been applied to Hindu widows, whose power of dealing with the property of their deceased husbands in many respects resembles the power of the manager for a minor to deal with the property of the minor. The rule may be said now to be, that one, who lends money to a Hindu widow on mortgage of property belonging to her deceased husband's estate, is bound to inquire into

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(*i*) *Doorga Muneé Dibeeah v. Chunder Muneé Dibeeah*, S. D. A. 1849, p. 64; *Kaleekaunt Lahoorree v. Goluck Chunder Chowdhree*, S. D. A. 1849, p. 405; *Goverdhum Singh v. Sheoshunkur Singh*, S. D. A. 1857, p. 401; *Rudhamohun Ghosal v. Girdhareelal Roy*, S. D. A. 1857, p. 460.

(*j*) *Supra*, pp. 37—40.

the necessity for the loan, and to satisfy himself as well as he can that the widow is acting in the particular instance for the benefit of the estate : if he does so inquire, and acts honestly, the real existence of an alleged, sufficient and reasonably-credited necessity is not a condition precedent to the validity of his mortgage : and he is not bound to see to the application of the money. A *bonâ fide* mortgagee will not suffer when he has acted honestly and with due caution, even if he be himself deceived. But though a purchaser for value is not bound to prove the antecedent economy or good conduct of the widow who alienates a portion of her husband's estate, or to account for the due appropriation of the purchase money, he is bound to use due diligence in ascertaining that there is some legal necessity for the loan, and may be reasonably expected to prove the circumstances connected with his own particular loan (*k*).

The Supreme Court, in the case of *Goluckmoney Dabee v. Diggumber Day* (*l*), said : "No part of the entire interest, when the widow takes by inheritance, is in suspense or abeyance in any way, nor is there a reversion on a life estate, but the whole interest is in the widow. When she

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(*k*) *Inder Chunder Baboo v. Hurnauth Chowdhry*, 1 Hay, 257 ; *Gobind Monee Dossee v. Sham Loll Bysack*, W. R. 1864, p. 153 ; *Ram Pershad Sookul v. Rajunder Sahoy*, 6 W. R. 262 ; *Nund Ooomar Mundal v. Gayetra Dossee*, 6 W. R. 323. See also *Ram Shewuk Roy v. Sheo Gobind Sahoo*, 8 W. R. 519 ; *Hurnath Roy Chowdree v. Indur Chunder Baboo*, S. D. A. 1859, p. 207 ; *Golukmonee Dassee v. Kishenpersad Kanoongoe*, S. D. A. 1859, p. 210 ; *Sreenath Roy v. Ruttunmalla Chowdhraïn*, S. D. A. 1859, p. 421 ; *Larmour v. Must. Tripoorasoonderee Dassee*, S. D. A. 1859, p. 567 ; *Byjnath Aye v. Shumbhoonath Dutt*, S. D. A. 1859, p. 1164 ; *Baboo Ishwur Dutt Singh v. Baboo Raj Koomar Singh*, S. D. A. 1860, vol. 2, p. 174. See also *Kameswar Pershad v. Run Bahadur Singh*, I. L. R. 6 Calc. 843.

(*l*) 2 Boulnois, 193. The following quotation is printed as it appeared in former editions of this work. Though not word for word, it is substantially the purport of a portion of Peel, C. J.'s, judgment. cf. pp. 197 *et seq.*



takes as heir under the Hindu law, she is ranked in all treatises as heir. Sir Francis Macnaghten treats her estate rightly as anomalous, and other writers treat it as coming to her as heir; therefore when they term it also a life estate, they mean that expression in a sense different from that of a pure and mere life estate. Such an estate as that last described may exist as well under the Hindu as under the English law. It exists when by donation, whether testamentary or *inter vivos*, property is given to one for life. In such a case, there would be no distinction in the nature of the interest, from that of a similar interest created by donation under the English law. The law upon the point has been settled by the decision of the Privy Council in the case of *Cossinauth Bysack v. Hurroosondery Dossee* (m). On the first hearing of that case in this Court, the Court declared by its decree as to the estate of the widow, that she took an interest for her life in the immoveable estate and an absolute interest in the moveable; on the latter point, adopting a distinction between moveable and immoveable estate, which does not prevail in Bengal; and also failing to mark the limitation of the power of disposal as to moveables. The case was re-heard, and the Court, by a subsequent decree, rectified its own decree, declaring as to both immoveable and moveable estate, that 'she should be declared entitled to the real and personal estate of her husband, to be possessed, used and enjoyed by her as a widow of a Hindu husband dying without issue, in the manner prescribed by the Hindu law.' It therefore expressly corrected the declaration that she took an interest for life, and declared her entitled in unrestricted terms, limiting the restrictive terms to the possession, use and enjoyment of the property. This decision was affirmed on appeal; since that decision, the decrees of this Court

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(m) Clarke's Rules and Orders, Append. p. 91.

in which it is necessary to declare what interest the Hindu widow takes, have been in conformity to it. It has been invariably considered for many years that the widow fully represents the estate; and it is also the settled law, that adverse possession which bars her, bars the heir also after her, which would not be the case if she were a mere tenant for life as known to the English law. Here the lessor of the plaintiff showed that the widow had made an alienation of the estate. Is the Court to assume it an unauthorized alienation? On what principle? We can discover none; there is neither authority nor principle to be found which would warrant the Court in saying, that under all circumstances, and whatever the nature of the suit or the position of the parties, or the rule which regulates the particular action, the presumption must ever be *prima facie* against the validity of the alienation by a Hindu widow of the estate to which she succeeds as heir. Still less should that presumption be made, where possession has gone along with it for a long time, and a dormant title is asserted against a purchaser for value, after many years. We have looked carefully through the cases cited, and can find none that establishes any such position. In our opinion the law presumes neither against nor in favour of an alienation by a Hindu widow."

In another case (n) *Colvile*, C.J., said: "The estate of a Hindu widow is very different from a mere life estate. The case of *Cossinauth Bysack v. Hurrosoondery Dabee*, (o) which has long given the law to this Court, establishes that the estate of the widow is something higher than a life estate: that it entitles her to the possession of the property without restriction: and that she has a qualified power of disposition in it, the limits of which it is diffi-

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(n) *Sreemutty Jadomoney Dabee v. Sarodaprosono Moolkerjee*, 1 Boulnois, 120 (cf. p. 129).

(o) See *Ante* p. 73.

cult, if not impossible, exactly to define further than by saying that the propriety of any particular exercise of that power must depend on the circumstances under which it is made, and must be consistent with the general principles of the Hindu law regarding such dispositions. The cases of *Oojulmoney Dossee v. Sagormoney Dossee*, (p) and *Hurrydoss Dutt v. Runjunmoney Dossee* (q) which have established in this Court the right of the reversionary heirs, though their interest is only contingent, to maintain a suit to restrain waste by the widow—particularly the latter case in which the late Chief Justice entered at large into the nature of the widow's estate,—are quite consistent with what I have stated. Sir Lawrence Peel there says 'the estate, though sometimes so expressed to be, is not an estate for life; when a widow alienates, she does so by virtue of her interest, not of a power, and she passes the absolute interest, which she could not do if she had but a life estate.' "

And in a later case (r) to which the Mitakshara law was applicable, the Privy Council thus described the estate of a Hindu widow: "According to the Hindu law a widow who succeeds to the estate of her husband in default of male

(p) 1 Tay. and Bell. 370.

(q) 2 Tay. and Bell 279.

(r) *Moniram Kolita v. Keri Kolitani*, I. L. R. 5 Calc. 776 (cf. p. 789); see also the description by Mahmood, J., in *Indar Kuar v. Lattu Prasad Singh*, I. L. R. 4 All. 532 (cf. p. 540); and for some other decisions as to the estate of a Hindu widow who inherits her husband's property under the Mitakshara law, see *Mussumat Thakoor Deyhee v. Rai Baluk Ram*, 11 Moore's I. A. 139; S.C. 2 Ind. Jur. 106; *Bhugwan-deen Doobey v. Myna Bae*, 11 Moore's I. A. 487; S.C. 9 W. R. (P. C.) 23; *The Collector of Masulipatam v. Cavalry Vencata Narrainapah*, 8 Moore's I. A., 529; S.C. 2 W. R. (P. C.) 59; *Gobur-dhun Nath v. Onoop Roy*, 3 W. R. 105; *Ram Shewuk Roy v. Sheo Gobind Sahoo*, 8 W. R. 519; *Keerut Singh v. Koolakul Singh*, 2 Moore's I. A. 331; S.C. 5 W. R. (P. C.) 131; *Dhando Ramchandra v. Balkrishna Govind Wagnekar*, I. L. R. 8 Bom. 190.

issue, whether she succeeds by inheritance or survivorship, as to which see the *Shivagunga* case (s), does not take a mere life estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant-in-tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband."

The *onus* of proving the necessity for an alienation by the widow lies on the mortgagee or purchaser, if it be disputed by the next heir. And although the mortgagee or purchaser is not bound to see to the application of the money and does not lose his rights if upon a *bonâ fide* inquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, still he is bound at least to show the nature of the transaction, and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognized necessities (t).

The payment of her husband's debts is a necessity justifying alienation by the widow,—but not (according to the Bombay High Court) the payment of a debt barred by limitation (u). So are payments reasonably made for religious or charitable purposes, and for the maintenance of the family. Thus the widow has been held to be justified in

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(s) *Katama Natchier v. The Rajah of Shivagunga*, 9 Moore's I. A. 539 (cf. p. 604.)

(t) *Kamesswar Pershad v. Run Bahadur Singh*, I. L. R. 6 Cal. 843 (cf. p. 847); *Kooer Goolab Singh v. Rao Kurun Singh*, 14 Moore's I. A. 176; S.C. 10 B. L. R. 1; *Raj Lukhee Dabea v. Gokool Chunder Chowdry*, 13 Moore's I. A. 209; S.C. 3 B. L. R. (P. C.) 57; see also *Gurunath Nilkanth v. Krishnaji Govind*, I. L. R. 4 Bom. 462.

(u) *Melgirappa bin Solbappa Teli v. Shivappa bin Erappa*, 6 Bom. H. C. (a. c. j.) 270.

raising money to meet payments (reasonable under the circumstances) for the *shrad* of her husband: for the marriage of his daughter and the maintenance of his daughter's sons: and for the widow's pilgrimage to Gya (*v*). But the digging of a tank, though in itself a good and useful act, has been deemed unnecessary and not to justify an alienation of the husband's estate (*w*). And so, where the widow instituted a suit beneficial to her husband's estate, but not necessary, and she had an income from which she might reasonably have herself defrayed the cost of the litigation, but instead of doing so she raised money on a bond, it was held that the reversionary heirs were not liable upon the bond (*x*). So also where a widow mortgaged a portion of her deceased husband's estate as security for the repayment of money which she borrowed for the purpose of suing for an estate to which her deceased husband had an alleged right of succession which he had not however himself sought to enforce, it was held that the mortgage could not prejudice the reversionary right of the next heir inasmuch as there was not any legal necessity for it within the meaning of Hindu law, and the suit, which had been dismissed, had not been for the benefit of the estate of the deceased husband (*y*).

Where a Hindu widow has borrowed money for such a purpose as would justify her in charging the estate, but has not in fact charged the estate, the reversioners take it as assets of her husband uncharged by debts incurred by her, however necessary and proper they may have been; for as

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(*v*) *Lalla Gunput Lall v. Mussamut Toorun Koonwar*, 16 W. R. 52; *Mahomed Ashruf v. Brijessuree Dassee*, 19 W. R. 426; S.C. 11 B. L. R. 118; *Mutteeram Kowar v. Gopaul Sahoo*, 11 B. L. R. 416.

(*w*) *Runjeet Ram Koolal v. Mahomed Waris*, 21 W. R. 49.

(*x*) *Roy Mukhun Lall v. W. Stewart*, 18 W. R. 121. And see generally the cases *supra*, as to alienations by guardians of minors and members of joint families.

(*y*) *Indar Kuar v. Lalta Prasad Singh*, I. L. R. 4 All. 532.

the reversioners succeed as heirs not to her but to her late husband, they do not represent her, and there is no privity of contract or estate to render them liable (z).

A sale by a widow was in the first instance contested on the ground that the property sold had been specifically devised by the deceased husband for charitable purposes. Failing to establish this point, the plaintiff sought to rely on the absence of proof of a legal necessity. It was held that under such circumstances the Court ought to be satisfied with less complete and positive evidence as to the necessity for the sale than would have been required if the plaintiff had in the first instance contested the sale as made without necessity (a).

It has been held by the Supreme Court (b) that if a Hindu widow in Bengal does not spend the whole of the income derived from her husband's estate, the savings belong to her absolutely, so that she can, by will or otherwise, dispose of them away from her husband's heirs. And accumulations made out of income which ought rightly to have gone from time to time into the hands of the widow, but were wrongfully withheld from her by her husband's brother, were in another case decided by the High Court to be her separate property (c). But their Lordships of the Privy Council in a later case (d) expressed the opinion that, if the

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(z) *Ramasami Mudaliar v. Sellattammal*, I. L. R. 4 Mad. 375; see also *Gadgeppa Desai v. Apaji Jivanrao*, I. L. R. 3 Bom. 237, but compare *Ramcoomar Mitter v. Ichomoyi Dasi*, I. L. R. 6 Cal. 36, *contra*.

(a) *Rangasvami Ayyangar v. Vanjulattammal*, 1 Mad. H. C. 28.

(b) *In the goods of Harendranarayan*, 4 B. L. R. (o. c. j.) 41, note.

(c) *Pannalal Seal v. Srimati Bamasundari Dasi*, 6 B. L. R. 732 (cf. p. 746). See also *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick*, 9 Moore's I. A. 123.

(d) *Mussumat Bhagbutti Dae v. Chowdry Bholanath Thakoor*, L. R. 2 I.A. 256 (cf. p. 260); S.C. I. L. R. 1 Cal. 104; a Mithila case.

widow took the estate only of a Hindu widow, she would be unable to alienate the profits, or that at all events whatever she purchased out of them would be an increment to her husband's estate, and the husband's reversionary heirs would be entitled to recover possession of all such property real and personal. The question was raised, but not decided, in another Mitakshara case in the Privy Council (e) when their Lordships said that their decision in *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (f) turned on the peculiar circumstances of the case, and is not an authority for the general proposition that a Hindu widow is absolutely entitled to or can dispose at her pleasure of accumulations of the income of her husband's estate.

In a recent case, which came before a Division Bench of the Calcutta High Court (*Ainslie and Broughton, JJ.*), the authorities on the point were reviewed and discussed at length; but though the learned Judges inclined to the view that the authorities in favour of the widow's power of alienation must prevail, they declined to give any decision on the point (g). But their Lordships of the Privy Council, to whom the case went on appeal, not only ruled that the case was one in which the Court was bound to give a decision, but took a different view from the Court below as to the state of the authorities (h). Their Lordships held that a widow's unexpended income from her husband's estate may be held in suspense, or become an accretion to her husband's estate. When she has invested such income and alienated the property so purchased *together with* the original estate of her husband for the purpose of changing the succession, the accretion was, in their Lordships' opinion,

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(e) *Gonda Koer v. Koer Oodey Singh*, 14 B. L. R. 159.

(f) 9 Moore's I. A. 123.

(g) *Hunsbutti Kerain v. Ishri Dutt Koer*, I. L. R. 5 Calc. 512.

(h) *Isri Dut Koer v. Mussumat Hansbutti Koerain*, L. R. 10 I. A. 150. S.C. I. L. R. 10 Calc. p. 324.



clearly established. Their Lordships stated (i) that it was "impossible to read Mr. Justice *Ainslie's* forcible argument without feeling that it is difficult to specify the point of time at which the widow loses her control over the unexpended portion of her income from her husband's estate. If she may spend or give away the whole, may she not put some by? If she saves one year or month, may she not spend those savings the next year or month? If she may save and spend again, may she not place her savings so as to get some income from them? And so on through all the steps of the *sorites*." Their Lordships, after examining the authorities on the subject, declared that (j) "they do not rest on what was said by them in *Bholanauth's* case as decisive of this case, for the observation must be taken as applied to the then pending case, and it was, moreover, extra-judicial, and is fairly open to the qualifications with which Mr. Justice *Ainslie* read it. Nor do they think it possible to lay down any sharp definition of the line which separates accretions to the husband's estate from income held in suspense in the hands of the widow as to which she has not determined whether or no she will spend it. As before said they feel the force of Mr. Justice *Ainslie's* reasoning on this point. In this case the properties in question consist of shares of lands, in which the husband was a shareholder to a larger extent. They were purchased within a short time after his death in 1857. No attempt to alienate them was made till 1873. The object of the alienation was not the need or the personal benefit of the widows but a desire to change the succession and to give the inheritance to the heirs of one of themselves in preference to their husband's heirs. Neither with respect to this object, nor apparently in any other way, have the widows made any distinction between the original estate and the after-purchases.

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(i) *Isri Dut Koer v. Mussumut Hansbutti Koerain*, L. R. 10 I. A. 150 (cf. p. 158).

(j) *Ibid.* p. 160.

Parts of both are conveyed to *Dyji* immediately, and parts of both are retained by the widows for life. These are circumstances which in their Lordship's opinion clearly establish accretion to the original estate, and make after-purchases inalienable by the widows for any purposes which would not justify alienation of that original estate."

In the latest case on this subject it was ruled by a Division Bench of the Calcutta High Court (*Mitter and Field, JJ.*), that a childless Hindu widow, has an absolute power to dispose of the profits of the estate inherited from her husband during her life. Where therefore she had by arrangement allowed a moiety share in those profits to a brother's widow, and the two widows had jointly purchased certain properties out of those profits, it was held that the heirs could, on the death of the widow, only claim a moiety share of those properties (*k*).

But whatever disposing power she may have over such property, land purchased by a Hindu widow with money derived from the income of her life estate passes, when undisposed of by her, to the heirs of her husband as an increment to the estate, and not to her heirs as property over which she had absolute control (*l*).

It is well established that any alienation of her husband's property is valid if made by the widow with the consent of the heirs of the husband. It was so held by the Privy Council as far back as the case of *Cossinaut Bysack v. Hurroosoondry Dossee* (*m*). But the question who are the heirs whose consent will thus render the alienation indefeasible has led to much conflict of decision. It has been ruled in certain cases that the consent of the nearest heirs is

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(*k*) *Birajun Koer v. Luchmi Narain Mahata*, I. L. R. 10 Calc. 392; a Mithila case.

(*l*) *Anund Chundra Mundul v. Nilmony Jourdar*, I. L. R. 9 Calc. 758. See also *Isri Dutt Koer v. Mussumut Hansbutti Koerain*, L. R. 10 I. A. 150, S.C. I. L. R. 10 Calc. 324 (cf. p. 335).

(*m*) 2 Morley's Digest, (ed. 1849), 198.

sufficient (n), and this view has been adopted in a late case by *Jackson, J.*, in which he observed that this, so far as he knew, was the rule usually acted upon by the Courts in Bengal, and declined to refer the question for the decision of a Full Bench (o). The contrary decision, however, was arrived at in 1812 (p) and that ruling was followed by the Bengal Sudder Court in 1856, when they said: "We are of opinion from the authorities cited in the margin (q) that in order to render a sale by a Hindu widow of her husband's property valid, it must be signed or attested by *all the heirs* of her husband then living; the execution or attestation by the *nearest* heirs alone is insufficient" (r).

There does not appear to any authoritative decision of the Calcutta Court on the point (s); but in Bombay, it has been lately held that the consent of all the heirs of the widow's husband, who are likely to be interested in disputing the transaction, is necessary (t); while a Full Bench of the Allahabad High Court has very recently ruled that the consent of the next reversioner is not sufficient to bind the

(n) *Collychund Dutt v. John Moore*, 1 Fulton 73; *Hafzoonnissa Begum v. Radhabinode Missur*, S. D. A. 1856, p. 595 (cf. p. 604); *Deep Chund Sahoo v. Hurdeal Singh*, S. D. A. 1849, p. 204; *Mohunt Kishen Geer v. Busgeet Roy*, 14 W. R. 379; *Sreemutty Jadomoney Dabee v. Sarodaprosono Mookerjee*, 1 Boulnois, 120 (cf. p. 131); *Gunga Pershad Kur v. Shumbhoonath Burmun*, 22 W. R. 393.

(o) *Raj Bullabh Sen v. Oomesh Chunder Roop*, I. L. R. 5 Calc. 44.

(p) *Mohun Lal Khan v. Ranee Siroomunnee*, 2 Sel. Rep. 32.

(q) *Mohun Lal Khan v. Ranee Siroomunnee*, 2 Sel. Rep. 32; *Nundkomar Rai v. Rajindurnaraen*, 1 Sel. Rep. 261; *Mussummaut Bhuwani Munev v. Mussummaut Solukhna*, 1 Sel. Rep. 322; *Hemchund Mujmoodar v. Mussummaut Tara Munev*, 1 Sel. Rep. 359.

(r) *Hafzoonnissa Begum v. Radhabinode Missur*, S. D. A. 1856, p. 595 (cf. p. 603).

(s) But see the opinions expressed in *Ram Chunder Poddar v. Hari Das Sen*, I. L. R. 9 Calc. 463, and *Gopeenath Mookerjee v. Kally Doss Mullick*, I. L. R. 10 Calc. 225.

(t) *Varjivan Rangji v. Ghelji Gokaldas*, I. L. R. 5 Bom. 563.

remoter reversioners (*u*). In a Privy Council case, referred to in both the last quoted rulings, their Lordships say: "Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu law" (*v*).

When the deed by which the widow mortgages or otherwise alienates her husband's estate is attested by the reversioner, the mere fact of his attestation does not necessarily import concurrence in the act set forth in the deed. But it is, no doubt, an element to be taken into consideration and deserving of weight in the estimation of all the evidence of the transaction (*w*). And certain decisions to the effect that if a reversioner signs the deed as witness, his assent to the act set forth in the deed will, without further inquiry, be presumed (*x*) go too far. Where, however, a reversioner was a witness to a deed and took a prominent part in making the arrangement contained in it, and the same had his full consent, it was held by the Allahabad High Court that he

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(*u*) *Ramphal Rai v. Tula Kuari*, I. L. R. 6 All. 116; see also *Sia Dasi v. Gur Suhai*, I. L. R. 3 All. 362.

(*v*) *Raj Lukhee Dabea v. Gokool Chunder Chowdhry*, 13 Moore's I. A. 209 (cf. p. 228); S.C. 3 B. L. R. (P. C.) 57 (cf. p. 63); see also Mayne's Hindu Law, 3rd ed., §§ 546, 547.

(*w*) *Raj Lukhee Dabea v. Gokool Chunder Chowdhry*, 13 Moore's I. A. 209 (cf. p. 228); S.C. 3 B. L. R. (P. C.) 57; *Madhub Chunder Hajrah v. Gobind Chunder Banerjee*, 9 W. R. 350. See also *Ram Chunder Poddar v. Hari Das Sen*, I. L. R. 9 Calc. 463.

(*x*) *Hafzoonnissa Begum v. Radhabinode Missur*, S. D. A. 1856, p. 595. See also *Sheikh Sukhaooddeen v. Hanmoo Moolla*, S. D. A. 1857, p. 271; *Nilmonee Shaha v. Sreemunih Ghose*, S. D. A. 1860, v.

was estopped by such conduct from afterwards questioning the legality and genuine character of such arrangement (y).

It appears to be settled law throughout India that a widow holding a Hindu widow's estate has a right to alienate to the extent of her own interest. If therefore a Hindu widow alienates, for other than allowable causes, property inherited by her from her husband, her act does not destroy her right, or vest the property in the reversioner. But the reversioner, without waiting for her death, may sue to obtain a declaration that the alienation is not binding except for her life, and also to prevent waste. A conveyance by a Hindu widow, for other than allowable causes, of property which has descended to her from her husband, is not necessarily an act of waste which destroys the widow's estate, and vests the property in the reversionary heirs; it is ordinarily binding during the widow's life. The reversionary heirs are not, after her death, bound by her conveyance: but they are not entitled, during her lifetime, to recover the property either for their own use, or for the use of the widow, or to compel the restoration of it to her. In deciding thus (z), the Court added: "Our decision will not preclude the reversionary heirs, even during the lifetime of the widow, from commencing a suit to declare that the conveyance was executed for causes not allowable, and is therefore not binding beyond the widow's life. Nor will it deprive the reversionary heirs, during the life of the widow, of their remedy against the grantee to prevent waste or destruction of the property, whether moveable or immoveable, in the event of their

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1, p. 625; *Gopaul Chunder Manna v. Gour Monee Dossee*, 6 W. R. 52; *Mussumat Noorun v. Khoda Buksh*, 1 N. W. P. (Agra) H. C., 50.

(y) *Sia Dasi v. Gur Sahai*, I. L. R. 3 All. 362.

(z) *Gobind Monee Dossee v. Sham Loll Bysack*, W. R. Sp. 165 (cf. p. 167). See also *Hurrykishen Doss v. Loll Soonder Doss*, 1 Hay, 339.

making out a sufficient case to justify the interference of the Court." In another case (a) the Court declared that if waste had been proved, the reversioner would have had a right to sue to restrain the widow from waste, "but his right to do this arises less from the necessity of protecting his own interests than from the function vested by the Hindu law in the next male heir of a person whose estate descends to a female, namely, that of protecting the estate."

If a reversioner suing in the widow's lifetime asks to have his right of inheritance declared, his prayer is premature, because it may be that he will not survive the widow. The reversioner, as being the person entitled to protect the estate, should sue merely for a declaration that the alienation by the widow, whether by way of mortgage or otherwise, has been made without such cause as in Hindu law justified such an alienation, and for a declaration that it will not be binding on the heirs after the death of the widow. What the reversioner is entitled to, is a declaration that upon the death of the widow, the right of inheritance will attach as if she had never made any alienation. The plaint must not pray for immediate possession.

Suits by a reversioner to restrain a widow or other Hindu female in possession from acts of waste, although his interest during her life is future and contingent, are suits of a very special class, and have been entertained by the Courts *ex necessitate rei*. If such a suit is brought, it must be brought by the reversioner with that object and for that purpose alone; and the question to be discussed is solely between him and the widow. He cannot by bringing such a suit get as between himself and a third party an adjudication of title which he could not get without it. The reversioner, in suing to restrain the widow from acts of waste, may have

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(a) *Musst. Pranputty Koer v. Lalla Futteh Bahadoor Singh*, 2 Hay, 608. See also *Phool Chund Lall v. Rughoobuns Suhaye*, 9 W. R. 108.

to prove not only the waste, but a title sufficient to give him a *locus standi* in Court. But this does not necessarily give him a right to bring a third party into Court in order to obtain against him a final adjudication as to the title to succeed eventually to the estate. A declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same Court,—or under special circumstances as to jurisdiction in some other Court (b).

In accordance with the above principles it has been ruled by the Calcutta High Court that persons having a contingent reversionary interest in lands expectant on the death of a Hindu widow, though they cannot sue for a declaration of title to the lands as against third persons (c), may sue as presumptive heirs to set aside alienations of the property made by the widow upon the ground of there being no legal necessity for such alienations, or to restrain her from committing waste. Unless such suits could be brought it might be impossible, if the widow lived to a great age, to bring evidence after her death to prove that there was no legal necessity for the alienations. Nor would it be possible

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(b) See the judgment of the Privy Council in *Strimathoo Moothoo Vijia Ragoonadah Rane Kolandarpuree Natchiar v. Dorasinga Tevar*, L. R. 2 I. A. 169 (cf. p. 101); S.C. 15 B. L. R. 83 (cf. p. 110). And see *Shama Soonduree Chowdhraim v. Jumoon Choudhrai*, 24 W. R. 86; *Phool Chund Lall v. Rughoobuns Suhaye*, 9 W. R. 108; *Rooknee Kant v. Karoona Moyee Goopta*, 2 W. R. 244; *Oodoy Chand Jha v. Dhun Monee Debia*, 3 W. R. 183; *Hurish Chunder Sein Lushker v. Bromo Moyee Dossia*, 5 W. R. 131; *Haradhun Naug v. Issur Chunder Bose*, 6 W. R. 222; *Chummun Mohunt v. Rajendur Sahoo*, 7 W. R. 119; *Shurut Chunder Sein v. Mothooranath Pudatiek*, 7 W. R. 303. See also *Mussamut Shibo Koeree v. Joogun Singh*, 8 W. R. 155; *Lalla Chuttur Narain v. Mussamut Wooma Koonwaree*, 8 W. R. 273; *Jeevun Ram v. Musst. Roonta*, 1 N. W. P. (Agra) H. C., 240.

(c) See as to this point *Greeman Singh v. Wahari Lall Singh*, I. L. R. 8 Calc. 12.



to prevent the widow from committing irremediable mischief to the estate (*d*).

But a claim to have several different alienations made by a widow declared void arises out of several distinct causes of action against the several persons who were the alienees of the particular properties, the subject of these alienations, and therefore cannot, under sec. 45 of the Code of Civil Procedure, form the subject of one suit (*e*).

If in a suit against the widow, waste be proved, the Court is not competent to put the reversioner in possession absolutely, subject merely to maintaining the widow. But if the necessities of the case require it, the Court may take the estate out of the hands of the widow and appoint a manager who will manage under the orders of the Court, rendering due accounts and so forth. It may be not improper to appoint the reversioner to be manager (*f*).

If there were a necessity such as the Hindu law warrants, for a sale of part of the property, and the widow sold a larger portion of the estate than was necessary to raise the amount which the law authorised her to raise, the sale would not be absolutely void as against the reversioners. They could set it aside only upon paying the amount which the widow was entitled to raise, with interest (*g*). And there is no rule of law which compels a widow, who alienates a portion of her husband's property, to have recourse to a mortgage rather than to a sale : for the question

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(*d*) *Chottoo Misser v. Jemah Misser*, I. L. R. 6 Calc. 198. See also *Hunsbutti Kerain v. Ishri Dutt Koer*, I. L. R. 5 Calc. 512 and the same case on appeal in the Privy Council, L. R. 10 I. A. 150; S.C. I. L. R. 10 Calc. 324.

(*e*) *Cachar Bhaj Vaija v. Bai Rathore*, I. L. R. 7 Bom. 289.

(*f*) *Musst. Maharani v. Nanda Lal Misser*, 1 B. L. R. (a. c. j.) 27; *Shama Soonduree Chowdrain v. Jumoona Chowdrain*, 24 W. R. 86.

(*g*) *Phool Chund Lall v. Rughoobuns Suhaye*, 9 W. R. 108, per Peacock, C.J. See *Moulvi Mahomed Shumsool Hooder v. Shewukram*, 14 B. L. R. 226.

whether in any particular transaction she has exceeded her powers, depends upon the necessities of each case (*h*).

Where a bond given by a widow for money borrowed by her, contains a recital that the money was borrowed for the purposes of her husband's *shrad*, the recital is no evidence of the fact as against the husband's heirs (*i*).

A purchaser from a widow is entitled to possession *during her life*, whether the sale by her was allowable or not (*j*).

When a widow made over her husband's estate to her daughter who was the next heir, it was held that this gave the reversioner no present right of action, as his reversionary right was not prejudiced by the widow's act (*k*).

A widow may relinquish her rights in favour of the nearest heir, for the time being, of her husband. Her rights thereupon cease, and the property vests absolutely in the heir in whose favor she relinquishes (*l*). But the heir in whose favour the relinquishment is made does not acquire any rights higher than those which the widow herself possessed. And therefore where a widow mortgaged a portion of her deceased husband's estate and then relinquished the estate in favour of the next heir, it was held that so long as the widow was alive, the heir's right of possession and enjoyment of the property was subject to the charges created by the widow before the deed of relinquishment (*m*).

(*h*) *Nabakumar Haldar v. Bhabasundari Debi*, 3 B. L. R. 375.

(*i*) *Sunker Lall v. Juddoobuns Suhaye*, 9. W. R. 285.

(*j*) *Bogooa Jha v. Lal Doss*, 6 W. R. 36; *Ram Gutty Kurmoker v. Boishtub Churn Mojoondar*, 7 W. R. 167; *Hurrylkishen Doss v. Loll Soonder Doss*, 1 Hay, 339; *Bhagavatamma v. Pampanna Gand*, 2 Mad. H. C., 293.

(*k*) *Udhar Singh v. Mussumat Ranee Koonwer*, 1 N. W. P. (Agra) H. C., 234; *D. Bangaraiya v. D. Balabhadra Razu*, 2 Mad. H. C., 386.

(*l*) *Kalee Coomar Nag v. Kashee Chunder Nag*, 6 W. R. 180; *Shama Soonduree v. Shurut Chunder Dutt*, 8 W. R. 500; *Sreemutty Jadomoney Dabee v. Sarodaprosono Mookerjee*, 1 Boulnois, 120 (cf. p. 131). See also *Protap Chunder Roy Chowdhry v. Sreemutty Joy Monee Dabee Chowdhraim*, 1 W. R. 98.

(*m*) *Indar Kuar v. Lalta Prasad Singh*, I. L. R. 4 All. 532.

The High Court at Allahabad has held that a Hindu widow does not forfeit her interest in her deceased husband's estate merely by divesting herself of such interest in favour of one of the next reversioners and therefore that such an act does not entitle another of the next reversioners to sue for possession of his share of the estate, or for a declaration of his right as such reversioner to succeed to a portion of the estate after the widow's death (*n*).

The power of a Hindu widow, to alienate her deceased husband's estate under certain circumstances, is not affected by the fact that she has received authority from her husband to adopt, and that the power is exercised in contemplation of adoption and in defeasance of the right of the son who is about to be adopted (*o*).

A suit to have it declared that an alienation is improper, should be brought by those whose interests are directly affected (as the next heirs), not by those whose rights are merely future and inchoate. But a remote reversioner may interfere and sue if the widow and the transferee and the nearer reversioner are acting fraudulently and in collusion with each other (*p*). And where the next reversioner had not been heard of for eight or nine years, and there was no proof of his being alive, the Court permitted the more

(*n*) *Prag Das v. Hari Kishn*, I. L. R. 1 All. 503.

(*o*) *Lakshmana Rau v. Lakshmi Ammal*, I. L. R. 4 Mad. 160. See also *Bamundoss Mookerjee v. Mussamut Tarinee*, 7 Moore's I. A. 169 (cf. p. 177.)

(*p*) *Raj Lukhee Dabee v. Gokool Chunder Chowdry*, 13 Moore's I. A. 209; S.C. 3 B. L. R. (P. C.) 57; *Koor Goolab Sing v. Rao Kurun Sing*, 14 Moore's I. A. 176; S.C. 10 B. L. R. 1; *Shama Soonduree Chowdhraïn v. Jumna Chowdhraïn*, 24 W. R. 86; *Dowar Rai v. Mussumat Boonda*, N. W. P. (Agra) H. C. (F. B.) 56; *Gauri Dat v. Gur Sahai*, I. L. R. 2 All. 41; *Har Sahai v. Chunni Kuar*, I. L. R. 4 All. 14.

remote reversioners to sue to avoid an alienation affecting their reversionary right made by the widow (*q*).

The cause of action in a suit to recover property alienated by a widow arises on her death : during her lifetime the rights of the reversioners are only contingent, and the law of limitation will run only from the date of the widow's death (*r*).

A suit brought during the life of the widow, for a declaration that the alienation is good for her life only, is barred by the law of limitation unless brought within twelve years of the alienation by her (*s*).

The assignee of a reversionary heir has no such interest in the estate as will enable him to bring a suit to have a mortgage and decree declared not binding on the estate. And this is so, even though the assignee is the next reversionary heir after the assignor (*t*).

If a Hindu dies leaving two widows and no nearer heirs, they take a joint estate. They take their husband's property as one, in coparcenery, with a right of survivorship :

(*q*) *Parmeshar Rai v. Bisheshar Singh*, I. L. R. 1 All. 53.

(*r*) *Nobin Ohunder Chuckerbutty v. Issur Ohandra Chuckerbutty*, 9 W. R. 505 (F. B.) ; *Srinath Gangopadhya v. Mahes Chandra Roy*, 4 B. L. R. (F. B.) 3 ; and see *Amirtolall Bose v. Rajoneekant Mitter*, 15 B. L. R. 10, S.C. 23 W. R. 214 ; *Tarini Charan Ganguli v. John Watson*, 3 B. L. R. (a. c. j.) 437 ; *Prosonna Nath Roy Chowdry v. Afzolonnessa Begum*, I. L. R. 4 Calc. 523 ; *Gya Persad v. Heet Narain*, I. L. R. 9 Calc. 93. So also *Sreenath Chatterjee v. Ramdeen Bhuttacharj*, S. D. A. 1859, p. 631 ; *Soodhakanth Kubiraj Mohunt Tagore v. Russomunjooree Thakoorain*, S. D. A. 1859, p. 681 ; *Tiluck Roy v. Phoolman Roy*, 7 W. R. 450 ; *Ram Shewuk Roy v. Sheo Gobind Sahoo*, 8 W. R. 519.

(*s*) *Bishonath Surmah v. Sreemutty Shushee Mookhee*, 20 W. R. 1 ; *Hunsbutti Kerain v. Ishri Dutt Koer*, I. L. R. 5 Calc. 512 (cf. pp. 520, 531). Act XV of 1877 sch. 2 art. 125.

(*t*) *Raicharan Pal v. Pyari Mani Dasi*, 3 B. L. R. (o. c. j.) 70. See *Brojo Kishoree Dassee v. Sreenath Bose*, 9 W. R. 463 But see *contra Rychurn Paul v. Musst. Peary Monee Dassee*, Marsh. 622.

and (under the Mitakshara) there can be no alienation or testamentary gift by one widow without the concurrence of the other (*u*).

But a different rule prevails in Bengal. For it has been held by a Full Bench of the High Court at Calcutta that where a Hindu governed by the Bengal School of Hindu law dies intestate leaving two widows his only heirs him surviving, either of these widows may sell her interest in her deceased husband's property, and further that the purchaser is entitled to enforce a partition as against the other widow, though the partition will not affect the right of survivorship of either widow (*v*).

The latter portion of this ruling would seem at first sight to be at variance also with a decision of the Privy Council in a case (*w*) which came before their Lordships on appeal from the Madras High Court, and in which it was laid down that, according to Hindu law current in southern India, the separate property of a person dying without male issue and leaving more than one widow is taken by all the widows as a joint estate for life, with rights of equal beneficial enjoyment and of survivorship, and that the widows have no right to enforce an absolute partition of the estate between themselves, though when from the conduct of one or more of their number, separate possession of a portion of the inheritance is the only likely means to secure for each peaceful enjoyment of an equal share of the benefits of the estate, an order for separate possession and enjoyment may be made. Their Lordships also, in the course of their

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(*u*) *Bhugwandeem Doobey v. Myna Bae*, 11 Moore's I. A. 487 ; S.C. 9 W. R. (P. C.) 23.

(*v*) *Janoki Nath Mukhopadhyaya v. Mothuranath Mukhopadhyaya*, I. L. R. 9 Calc. 580 (F. B.) ; see also *Srimati Padmamani Dasi v. Srimati Jagadamba Dasi*, 6 B. L. R. 134.

(*w*) *Gajapathi Nilamani v. Gajapathi Radhamani*, I. L. R. 1 Mad. 290 (P. C.) ; S.C. L. R. 4 I. A. 212.

judgment, referred to and approved of the decision of the same High Court in the case of *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba* (x) which was to the same effect.

But as pointed out by the Calcutta Full Bench the Privy Council in this later case only reaffirmed the proposition which was laid down by them in the case of *Bhugwandeon Doobey v. Myna Bae* (y), and which the Full Bench accepted, namely, that there could not be a partition between joint widows so as to affect the right of survivorship of either (z).

On the death of one widow, her interest in her husband's estate survives to the other widow. Therefore no cause of action (as against third parties) can accrue to the reversioner until the death of the surviving widow, even in respect of a moiety of the property (a).

In a recent case, in which the Bombay High Court ruled that where the doctrines of the Mayukh prevail, daughters take not only absolute but several estates, the Court expressed an opinion that the same rule should apply in the case of widows, though it admitted that such a rule would not be in accordance with that which the Privy Council has held to prevail in Bengal and Madras (b).

A decree fairly obtained against the widow, as representing her husband, is binding upon his estate and upon

(x) 3 Mad. H. C. 424.

(y) 11 Moore's I. A. 487; S.C. 9 W. R. (P. C.) 23.

(z) *Janoki Nath Mukhopadhyaya v. Mothuranath Mukhopadhyaya*, I. L. R. 9 Calc. 580 (cf. p. 585), and see the recent Madras decision in *Gurivi Reddi v. Chinnamma*, I. L. R. 7 Mad. 93. But compare an earlier Madras ruling, *Kathaperumal v. Venkabalai*, I. L. R. 2 Mad. 194, which the Calcutta Full Bench say, seems to them "to be based upon a misapprehension of the Privy Council cases."

(a) *Gobind Chunder Mojomdar v. Dulmeer Khan*, 23 W. R. 125. See *Mussamut Indubansi Kunwar v. Mussamut Gribhirun Kunwar*, 3 B. L. R. (a. c. j.) 289.

(b) *Bulakhidas v. Keshavlal*, I. L. R. 6 Bom. 85 (cf. p. 88).

the reversioners. In the case of the *Rajah of Shivagunga* (c) their Lordships of the Privy Council said that, assuming the widow to be entitled, as heiress of her husband, to the zemindary in dispute, "the whole estate would for the time be vested in her,—absolutely for some purposes, though in some respects for a qualified interest: and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to the case of a Hindu widow. And it is obvious there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

But where a widow, the heiress of her deceased husband, allowed certain maintenance for which the property was liable to fall into arrears, and the person entitled to the maintenance brought a suit against the widow personally for the amount of the arrears, and obtained a money decree in execution of which the widow's right, title, and interest in the property left by her husband were sold, the Privy Council held, in a suit by the reversionary heir after the death of the widow to establish his right of inheritance to, and to recover possession of the property, that inasmuch as neither the decree nor the sale proceedings had declared the property itself to be liable for the debt, the purchaser at the execution sale took only the widow's interest and not the absolute estate, and therefore the plaintiff was entitled to recover (d). The exact interest which passes at a sale of a Hindu widow's "right, title, and interest" in any

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(c) *Katama Natchiar v. The Rajah of Shivagunga*, 9 Moore's I. A. 539; S.C. 2 W. R. (P. C.) 31.

(d) *Baijun Doobey v. Brij Bhookun Lall Awusti*, I. L. R. 1 Calc. 133. See also *Kisto Monee Dassee v. Prosunno Narain Chowdhry*, 6 W. R. 304.



property, would seem to depend upon whether the suit in which the sale was directed was one brought against the widow upon a cause of action personal to herself, or one which affected the whole inheritance in the property (e).

When a widow, who was not her husband's heiress, sold certain property belonging to his estate, *bonâ fide* for the purpose of paying off debts which had been contracted by the deceased, and the heirs came forward and caused the sales which she had made to be set aside, it was held that the purchaser, the sale to whom had been declared void, might claim, as against the heirs, to stand in the position of one who had advanced money to a childless widow for proper purposes, or at any rate that he might be considered entitled to have those charges which his monies had satisfied revived against the inheritance. The heirs were declared liable for the amount of the purchase-money to the extent of the assets of the deceased received by them (f).

One who, without inquiry, purchased from a Hindu wife, whose husband was alive, was held—in a suit to have it declared that the property belonged to the husband and not to the wife—to be in no sense a *bonâ fide* purchaser without notice of the husband's rights (g). But if a husband allows his wife to appear as the owner of an estate, and she mortgages it, and the husband subsequently ratifies her act, neither the husband nor an execution creditor of his can set aside the mortgage on the ground that the wife was not the owner (h).

Where a wife whose husband had been absent from his home about a year executed "as heir and in possession of the property of her husband," together with her husband's brothers a joint bond for the repayment of money borrowed

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(e) *Jotendro Mohun Tagore v. Jogul Kishore*, I. L. R. 7 Calc. 357.

(f) *Roostum Singh v. Alum Singh*, 1 N. W. P. (Agra) H. C. 291.

(g) *Bindao Bashinee Debee v. Pearee Mohun Bose*, 6 W. R. 312.

(h) *Baneepershad v. Baboo Maun Singh*, 8 W. R. 67.

to pay a debt due by her husband and his brothers, and to carry on the cultivation of lands held by her husband and his brothers, and mortgaged the family house as collateral security for the repayment of such moneys, the Allahabad High Court held, in a suit by the mortgagees upon the bond against not only the executors but also against the husband and his share of the family house, that the husband and his property were not liable for the bond-debt. A Hindu husband is not liable for a debt contracted by his wife, except where it has been contracted under his express authority, or under circumstances of such pressing necessity that his authority may be implied. In this case express authority had certainly not been given, and there were no circumstances of such pressing necessity that the husband's authority might be implied. Moreover, the plaintiffs had dealt with the wife as making the disposal of the property in her own right, and not looking in any way to the husband as responsible for the debt, and the circumstances were not such as to justify the plaintiffs in thus dealing with the wife (i).

The estate taken by a mother who inherits from her son (j), or, except in Bombay, by a daughter who inherits from her father (k), is similar in all respects to that of a

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(i) *Pusi v. Mahadeo Prasad*, I. L. R. 3 All. 122.

(j) *Mussumaut Bijya Dibe v. Mussumaut Unpoorna Dibe*, 1 Sel. Rep. 162; *Nufur Mitur v. Ram Koomar Chuttoorjya*, 4 Sel. Rep. 310; *Bhyrobee Dossee v. Nubkissen Bhose*, 6 Sel. Rep. 53; *Hemlutta Debea v. Goluck Chunder Gosayn*, 7 Sel. Rep. 108; *P. Bachiraju v. V. Venkatappadu*, 2 Mad. H. C. 402; *Rajah Vellanki Venkata Krishna Row v. Venkata Rama Lakshmi Narsayya*, L. R. 4 I. A. 1 (cf. p. 8); *Narsappa Lingappa v. Sakharam Krishna*, 6 Bom. H. C. (a. c. j.) 215; *Sakharam Sadashiv Adhikari v. Sitabai*, I. L. R. 3 Bom. 353 (cf. p. 368); *Bharmangavda v. Rudrapgavda*, I. L. R. 4 Bom. 181 (cf. p. 187).

(k) *Chotay Lall v. Chunnoo Lall*, 14 B. L. R. 235; and for the same case on appeal before the Privy Council see I. L. R. 4 Cal.

widow who is her husband's heiress. Thus where the daughter while in possession of the paternal estate borrowed a large sum of money on mortgage, and only part of the money was borrowed under any legal necessity,—it was held (in a suit by the next heir after the daughter's death to recover the property mortgaged), that the mortgage must be set aside, upon repayment by the next heir of the amount which was borrowed under legal necessity (1).

But in Bombay there have been a series of decisions under which it has been ruled that the daughter (m), sister (n) and great-niece (o) take absolutely, and may alienate lands by deed or devise them by will.

It would seem that by Hindu law a son is bound to provide his mother with a suitable place in which to live: and that therefore a son who has inherited from his father a house in which the family in his life time lived, cannot sell the house without providing a suitable residence for his mother (p).

744 (cf. p. 754); S.C. L. R. 6 I. A. 15; *Sengamalathammal v. Valaynda Mudali*, 3 Mad. H. C. 312; *Kattama Nachiar v. Dorasinga Tevar*, 6 Mad. H. C. 310.

(1) *Lalit Panday v. Sridhar Deo Narayan Sing*, 5 B. L. R. 176.

(m) *Haribhat v. Damodarbhut*, I. L. R. 3 Bom. 171 and cases there cited; *Babaji bin Narayan v. Balaji Ganesh*, I. L. R. 5 Bom. 660.

(n) *Bhaskar Trimbak Acharya v. Mahadev Ramji*, 6 Bom. H. C. (o. c. j.) 1; *Bharmangavda v. Rudrappavda*, I. L. R. 4 Bom. 181 (cf. p. 187). In Bengal a sister cannot succeed as heir to her brother, *Anund Chunder Mookerjee v. Teetooram Chatterjee*, 5 W. R. 214; *Srimati Rukkini Dasi v. Kadarnath Ghose*, 5 B. L. R. app. 87. In Madras she does apparently inherit, *Kutti Ammal v. Radakristna Aiyar*, 8 Mad. H. C. 88.

(o) *Tuljaram Morarji v. Mathuradas*, I. L. R. 5 Bom. 662.

(p) *Mangala Debi v. Dinanath Bose*, 4 B. L. R. (o. c. j.) 72. So *Gauri v. Chandramani*, I. L. R. 1 All. 262; *Talemand Singh v. Kukmina*, I. L. R. 3 All. 353. See *Johurra Bebee v. Sreegopa*

A widow who is not her husband's heiress, has a right to maintenance out of his estate. As against the heir she has a right to maintenance out of the property belonging to the estate. She has also a right to maintenance out of such property in the hands of any one who takes it with notice of her claim for maintenance. But she has no lien or charge on the property as against third parties, irrespective of notice (q).

It has been held by a Full Bench of the Allahabad High Court that the maintenance of a Hindu widow is not, until it is fixed and charged on her deceased husband's estate by a decree or by agreement, a charge on such estate which can be enforced against a *bonâ fide* purchaser for value without notice. When the maintenance of a Hindu widow has been expressly charged on her husband's estate, a portion of such estate will be liable to the charge in the hands of a purchaser, even if it be shewn that the heirs to the estate have retained enough of it to meet the charge, but the estate will not be liable if its transfer has taken place to satisfy a claim for which it is liable under Hindu law, and which under that law takes precedence of a claim for maintenance (r). Following this ruling it was decided in a later case that the *bonâ fide* purchaser for value of the

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*Misser*, I. L. R. 1 Calc. 470; *Venkatammal v. Andyappa Chetti*, I. L. R. 6 Mad. 130; *Dalsukhrām Mahasukhrām v. Lallubhai Motichand*, J. L. R. 7 Bom. 282.

(q) *Adhiranee Narain Coomary v. Shona Malee Pat Mahadai*, I. L. R. 1 Calc. 365. See also on the general question as to the rights of the widow as against her husband's heirs, *Ganga Bai v. Sita Ram*, I. L. R. 1 All. 170 (F. B.); *Savitribai v. Luximibai*, I. L. R. 2 Bom. 573 (F. B.); *Srimati Bhagabati Dasi v. Kanailal Mitter*, 8 B. L. R. 225; *Nistarini Dasi v. Mukhanlal Dutt*, 9 B. L. R. 11.

(r) *Sham Lal v. Banna*, I. L. R. 4 All. 296 (F. B.) See also *Kalpagathachi v. Ganapathi Pillai*, I. L. R. 3 Mad. 184; *Mahalakshamma v. Venkataratnamma*, I. L. R. 6 Mad. 83; *Venkatammal v. Andyappa*, I. L. R. 6 Mad. 130.

estate of a Hindu husband, sold in order to satisfy the husband's debts, does not take such estate subject to the wife's maintenance, even if such maintenance is fixed and charged upon the estate (s).

In Bombay, the nature of a Hindu widow's right to maintenance, and the extent to which it is a charge on the estate in the hands of a purchaser for value, have formed the subject of an elaborate judgment by *West, J.* The suit was one for maintenance brought by a Hindu widow against her husband's brother, who was the sole surviving member of her husband's family, and against certain *bonâ fide* purchasers for value from the husband's brother of certain immovable ancestral property of the family. The conclusions at which *West, J.*, arrived have been summarized in a recent decision (t) as follows—that it was open to the sole surviving proprietary member to sell the estate which had vested in him; that he could not however by so doing affect the right of the widow if it had become a right *in re* adhering to the estate, though the widow's right, until made a precise and actual charge on the property, could not prevent the said proprietary member dealing with it at his discretion; that such member, who with a view to defraud the widow, parted with the estate, could not by so doing get rid of his liability, and that the vendee, who shared in the proposed fraud, could not be allowed to profit by it, though if he bought knowing of the widow's existence and of her claim, but in the *bonâ fide* belief that no wrong would be

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(s) *Gur Dayal v. Kaunsila*, I. L. R. 5 All. 367. See also *Adhiranee Narain Oomary v. Shona Malee Pat Mahadai*, I. L. R. 1 Calc. 365; *Natchiarammal v. Gopalakrishna*, I. L. R. 2 Mad. 126, and compare *Lakshman Ramchandra Joshi v. Satyabhamabai*, I. L. R. 2 Bom. 494.

(t) *Dalsukhram Mahasukhram v. Lallubhai Motichand*, I. L. R. 7 Bom. 282 (cf. p. 285).

wrought upon her by the sale, he would acquire a title free from the claim (u).

But voluntary alienations would seem to stand on a different footing. So a widow is entitled to follow her husband's property in the hands of donees to recover her maintenance, her right to which is not affected by any agreement made by her with her husband in his lifetime (v).

If it is clear that the intention was to bestow such an estate on her, a Hindu wife or widow may take an absolute estate in immovable property by gift (w), or devise (x) from her husband. But in the absence of proof of any such intention, the interest she takes in such property would seem to be limited in the same way as her interest in property inherited from her husband (y).

It has been ruled in Bombay that a Hindu female is not on account of her sex disqualified from entering into a contract, and that marriage does not take away or destroy

(u) *Lakshman Ramchandra Joshi v. Satyabhamabai*, I. L. R. 2 Bom. 494.

(v) *Narbadabai v. Mahadeo Narayan*, I. L. R. 5 Bom. 99. See also *Jamna v. Machul Sahu*, I. L. R. 2 All. 315.

(w) *Ram Narain Sing v. Pearay Bhugut*, I. L. R. 9 Calc. 830. See also *Srimati Pabitra Dasi v. Bamudar Jana*, 7 B. L. R. 697.

(x) *Prosunno Coomar Ghose v. Tarrucknath Sircar*, 10 B. L. R. 267; *Koonjbehari Dhur v. Premchand Dutt*, I. L. R. 5 Calc. 684; *Jeevun Punda v. Mussumat Sona*, 1 N. W. P. H. C. Pt. II. p. 6. Compare *Seth Mulchand Badharsha v. Bai Mancha*, I. L. R. 7 Bom. 491. For the proposition that testamentary gifts by Hindus are to be treated as a species of gift, see *Jatindra Mohan Tagore v. Ganendra Mohan Tagore*, 9 B. L. R. 377; *Judoonath Sircar v. Bussunt Coomar Roy Chowdhry*, 11 B. L. R. 286 (cf. p. 295).

(y) *Teencowree Chatterjee v. Dinonath Banerjee*, 3 W. R. 49; *Luchmun Chunder Geer Gossain v. Kalli Churn Singh*, 19 W. R. 292 (P. C.); *Rudr Narain Singh v. Rup Kuar*, I. L. R. 1 All. 734; *Ganguduraiya v. Parameswaramma*, 5 Mad. H. C. 111; *Kotarbasapa v. Chanverova*, 10 Bom. H. C. 403.

any capacity possessed by her in this respect. She is capable of acquiring and holding property in her own right, and when she holds any such, her power over it is absolute. The absence of consent therefore on her husband's part cannot affect her power to deal with such property (z); and where a married woman mortgaged, jointly with her husband, a house which was her property and covenanted, jointly with her husband and separately for herself, to repay the mortgage money, it was held in a suit by the creditor to recover the balance of the debt which remained due, after the house had been sold in pursuance of a power of sale contained in the mortgage deed, that the wife must be held to have contracted with reference to her *stridhan* or separate property, and to be, therefore, so far as her *stridhan* extended, liable to the plaintiff (a).

The creditor of a deceased Hindu does not obtain any better position as against the debtor's estate, than that which he enjoyed during the debtor's lifetime. When the estate has passed to the heirs of the debtor, the creditor may have recourse to it, so long as it remains in their hands for the satisfaction of his debt. If he allows the heirs to dispose of the estate to a *bonâ fide* purchaser, he cannot follow it in the hands of the purchaser, but has only a right to bring a suit against the heirs personally, who are responsible to him to the extent of the assets they receive. A creditor, whose debt is not secured by a mortgage or hypothecation, has not on the death of the debtor such an interest in his estate, as prevents the heirs from selling it to a *bonâ fide* purchaser so as to confer

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(z) *Nathubhai Bhailal v. Javher Raiji*, I. L. R. 1 Bom. 121 (cf. p. 123).

(a) *Govindji Khimji v. Lakmidas Nathubhoj*, I. L. R. 4 Bom. 318. See also *Nahalchand v. Bai Shiva*, I. L. R. 6 Bom. 470; *Narotam v. Nanka*, I. L. R. 6 Bom. 473 as to the extent of a married woman's liability.



upon him a clear title. The purchaser does not take the property subject to the claim of the creditor (*b*).

And in a recent case it was held by *Pontifex*, J., that the principles which are applicable in England, owing to statutory provisions, to the case of purchases from heirs and devisees, being principles of natural equity, are also applicable to the case of purchases from Hindu heirs and devisees. These principles, as stated by the learned Judge, are, that the creditors of the ancestor or testator may follow his lands into the possession of a purchaser from the heir or devisee, if it can be proved that such purchaser knew (1) that there were debts of the ancestor or testator left unsatisfied; and also (2) that the heir or devisee to whom he paid his purchase-money intended to apply it otherwise than in the payment of such debts. But a purchaser ignorant of either of these points has a safe title, for no duty is cast upon the purchaser from the heir or devisee to enquire whether there are any debts of the ancestor or testator, or to see to the application of his purchase-money. Further, the burden of proof is entirely on the creditor to show that the purchaser from the devisee had notice that the latter intended to misapply the purchase-money (*c*).

But undivided family property is not, generally speaking, liable in the hands of surviving co-parceners to the debt of a deceased co-parcener, not incurred on behalf of the family (*d*).

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(*b*) *Zuburdust Khan v. Indurmun*, N.W.P. (Agra) (F. B.) 71; *Nilkant Chatterjee v. Peari Mohan Das*, 3 B. L. R. (o. c. j.) 7; *Monomotho Nath Day v. Greender Chunder Ghose*, 24 W. R. 366; *Unnopoorna Dassea v. Gungo Narain Paul*, 2 W. R. 296; *Jamiyatrām Ramchandra v. Parbhudas Hathi*, 9 Bom. H. C. 116.

(*c*) *Greender Chunder Ghose v. Mackintosh*, I. L. R. 4 Cal. 897; and see *Kasumunnissa Bibee v. Nilratna Bose*, I. L. R. 8 Cal. 79 (cf. p 86).

(*d*) *Goor Pershad v. Sheodeen*, 4 N.W.P. H. C. 137; *Udaram*

And the principles applicable in the case of alienations of the estate of a deceased Mahomedan by his heirs are similar to those which govern alienations by the heirs of a deceased Hindu (e).

A Mahomedan widow's right to dower is usually simply in the nature of a debt which she, like any other creditor, can take legal means to enforce against such property of her deceased husband as she can find in the hands of his heirs. If she is herself in possession of her husband's estate, she has a lien on it in respect of her own debt, as against the other heirs, and is entitled to pay her own debt in preference to any other (f). She cannot legally alienate property devolving upon her as dower, without the consent of the other heirs of her husband : and a mortgage made by her without such consent may be set aside by them (g).

But the right to dower is personal to the widow and does not pass to the purchaser of the estate. For a widow's

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*Sitaram v. Ranu Panduji*, 11 Bom. H. C. 76 ; *Narsinbhat bin Bhapubhat v. Chenepa bin Ningapa*, I. L. R. 2 Bom. 479 ; *Zemindar of Sivagiri v. Alwar Ayyangar*, I. L. R. 3 Mad. 42 ; *Hanumantha v. Hunumayya*, I. L. R. 5 Mad. 232 ; *Karpakambal v. Subbayyan*, I. L. R. 5 Mad. 234.

(e) *Bazayet Hossein v. Dooli Ohund*, I. L. R. 4 Calc. 402 (P. C.) ; S.C. L. R. 5 I. A. 211 ; *Shah Enaet Hossein v. Syud Rumzan*, 10 W. R. 216 ; S.C. 1 B. L. R. (a. c. j.) 172 ; *Mussamut Begum v. Doolee Chund*, 20 W. R. 92 ; *Narsingh Dass v. Najmooddin Hossein*, I. L. R. 8 Calc. 20. See also *Assamathem Nessa Bibee v. Roy Lutchmeeput Singh*, I. L. R. 4 Calc. 142 (F. B.) ; *Muttyjan v. Ahmed Ally*, I. L. R. 8 Calc. 370.

(f) *Mussamut Begum v. Doolee Chund*, 20 W. R. 92 ; *Sayad Umed Ali v. Mussamut Saffiham*, 3 B. L. R. (a. c. j.) 175 ; *Mussamut Wahidunnissa v. Mussamut Shubrattun*, 6 B. L. R. 54.

(g) *Sullamut Bebee v. Sheikh Mahommed Tulkee*, S.D.A. N.W.P., 1853, p. 45. See also *Mahomed Ussud-ool-lah Khan v. Mussamat Ghasheea Beebee*, 1 N.W.P. (Agra) H. C. 150 ; *Mussamat Kummur-ool-nissa Begum v. Mahomed Hussun*, 1 N. W. P. (Agra) H. C. 287.

dower stands upon no higher or better footing than any other debt due from her deceased husband, and except where there is an express agreement to that effect, there is no presumption of hypothecation of his estate for her dower to be drawn from the mere circumstance that dower is due, and therefore a purchaser of a deceased husband's estate from a Mahomedan widow in possession thereof, pending payment of her dower is not entitled to plead non-satisfaction of her dower-debt to a claim by her husband's heirs for their share of his inheritance (*h*).

As a general rule of Hindu law, property given for the maintenance of religious worship and of charities connected with it, is inalienable. But it is nevertheless competent for the *shebait* of property dedicated to the worship of an idol, in the capacity of *shebait* and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the *shebait* of an idol's estate would appear to be in this respect analogous to that of the manager of an infant heir as defined in *Hunumanpersaud Panday's* case (*i*). It is only in an ideal sense that property can be said to belong to an idol: and the possession and management of it must, in the nature of things, be entrusted to some person as *shebait* or manager. It follows that the person so entrusted must of necessity be empowered to do whatever may be required for the

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(*h*) *Ali Muhammad Khan v. Azizullah Khan*, I. L. R. 6 All. 50. See also *Mussumat Bebee Bachun v. Sheikh Hamid Hossein*, 14 Moore's I. A. 377; and *Bazayet Hossein v. Dooli Chund*, I. L. R. 4 Calc. 402 (P. C.)

(*i*) See *ante* pp. 38-40; 6 Moore's I. A. 393 (cf. p. 423.)

service of the idol and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. And assuming that a *shebait* may incur debts or borrow money for necessary purposes, it appears right and reasonable that judgments obtained against a former *shebait* in respect of debts so incurred should bind succeeding *shebait*s, who in fact form a continuing representation of the idol's property (*j*).

And accordingly where decrees had been obtained against a *shebait* upon his bond, for the repayment of money said to have been borrowed for the service of the idol, and the decrees directed that the debt should be paid by the *shebait* personally, and if not, should be realised from the profits of the *dewuttur* lands—the Privy Council held (in a suit by the successors of the *shebait* to have the *dewuttur* property released from attachment) that the decrees being untainted by fraud or collusion, and having been passed after the necessary and proper issues had been raised and determined, were binding on the succeeding *shebait*s (*k*).

It has been ruled by the Privy Council in a case which has already been referred to (*l*) that even if it had appeared that the purchaser of *dewuttur* land had notice that the whole of the purchase money was not required for the purposes of the endowment, but that part of it was to be expended on other objects, an action would not lie to set aside the sale altogether, since the purchaser would be

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(*j*) *Konwar Doorganath Roy v. Ram Chunder Sen*, I. L. R. 2 Calc. 341 (P. C.); S.C. L. R. 4 I. A. 52; *Prosunno Kumari Debya v. Golab Chand Baboo*, L. R. 2 I. A. 145 (cf. p. 151); S.C. 14 B. L. R. 450 (cf. p. 458); *Maharanee Shibessourree Debta v. Mothooranath Acharjo*, 13 Moore's I. A. 270.

(*k*) *Prosunno Kumari Debya v. Golab Chand Baboo*, L. R. 2 I. A. 145; S.C. B. L. R. 450.

(*l*) *Konwar Doorganath Roy v. Ram Chunder Sen*, I. L. R. 2 Calc. 341 (P. C.) (cf. p. 353); S.C. L. R. 4 I. A. 52 (cf. p. 65).

entitled to be reimbursed so much of the money as had been legitimately advanced.

Though the *shebait* cannot alienate the *dewuttur* lands, he can create derivative tenures and estates conformable to usage (*m*).

When the endowment is merely nominal, and not *bonâ fide*, the property will be dealt with in the ordinary mode, and will not be treated as property set apart for religious purposes. And it is not merely because a person purchases property in the name of an idol, or conveys it to an idol, that this is to be considered a dedication of the property to religious purposes which renders it inalienable. There must be clear evidence of a real endowment and that it was the intention of the donor, subsequently *bonâ fide* acted on, that the worship of the idol should be kept up for the benefit of his heirs in perpetuity or of the public (*n*). So the mere fact that the rents of a particular *mehal* have been applied for a considerable period to the worship of an idol is not sufficient proof that the *mehal* is *dewuttur* (*o*).

It is frequently difficult to say whether there has or has not been a real dedication to religious purposes which makes the property inalienable. In a case in which the deeds relied on contained provisions for the endowment and support of idols and their worship, which were in the nature of trusts impressed on the property to be per-

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(*m*) *Maharanee Shibessouree Debia v. Mothoranath Acharjo*, 13 Moore's I. A. 270. So *Tahboonissa Bibee v. Koomar Sham Kishore Roy*, 15 W. R. 228; *Arruth Misser v. Juggurnath Indraswamee*, 18 W. R. 439.

(*n*) *Maharanee Brojosoondery Debea v. Ranees Luchmee Koonwaree*, 20 W. R. 95 (P. C.); *Promotho Dossee v. Radhika Persaud Dutt*, 14 B. L. R. 175; *Shoojat Ali v. Zumeerooddeen*, 5 W. R. 158; *Gunga Narain Sircar v. Brindabun Chunder Kur Chowdhry*, 3 W. R. 142.

(*o*) *Konwar Doorganath Roy v. Ram Chunder Sen*, I. L. R. 2 Cal. 341 (P. C.) (cf. p. 349); S.C. L. R. 4 I. A. 52 (cf. p. 61).

formed by the donee,—the Privy Council said (p): “In the case of a bare trust leaving no beneficial enjoyment to the donee, there would be strong ground for the implication that the property was not alienable and was to descend to the donee’s heirs as trustees in succession. But it was contended that in these grants the trust is coupled with an interest, giving the donee a right to the enjoyment of the surplus as a fruit of the property, after making due provision for the sustentation of the idols and their worship, and therefore that there is a beneficial ownership capable of alienation. The case of *Sonatun Bysack v. Sreemutty Juggutsoondree Dossee* (q) was cited to show that such a beneficial interest may exist as a secular right in property dedicated primarily to the worship of idols. In that case, it is true, a disposition of the surplus was expressly made by the will of the donor: but their Lordships do not doubt that cases may occur where, from the nature and terms of the gift, the intention of the donor to confer a beneficial and alienable interest in the property dedicated may be inferred. \* \* \* It would unquestionably be more consonant with the genius and spirit of Hindu law and usages that endowments of this kind should be made to a family by whose members in succession the worship might be performed, than to an individual who might sell or give them to a stranger.”

Where the lands themselves have been dedicated to an idol, they cease to be the property of the family, except otherwise than as representing the idol, and are, therefore, impartible. But where only the profits have been dedicated, the lands remain the property of the several members of the family, subject to a trust in favour of the idol, and

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(p) *Rajah Ohundernath Roy v. Kooar Gobindnath Roy*, 11 B. L. R. 86 (cf. p. 112).

(q) 8 Moore’s I. A. 66.

are therefore partible among the members, but subject always to the trust (r).

Where a grantor creates a secular estate with a religious motive, the grant does not stand on the same footing with a religious endowment, and is not, therefore, exempt from the rule as to perpetuities (s).

A *shebait* cannot get rid of the trusts to which he is subject, merely by reason of resumption proceedings resulting in a settlement for revenue with him in his private character. The settlement in no degree relieves the *shebait* of his trust: and does not render alienable land which, irrespectively of it, was not alienable (t).

The Mahomedan law as to mortgaging or otherwise alienating *wuqf* land (u), is in many respects similar to the Hindu law as regards *dewuttur* property. Those alienations only which fall within the scope and spirit of the endowment, or which are necessary for its maintenance or protection, will be supported (v).

(r) *Ram Coomar Paul v. Jogender Nath Paul*, I. L. R. 4 Calc. 56. See also *Konwar Doorganath Roy v. Ram Chunder Sen*, I. L. R. 2 Calc. 341 (cf. p. 350); S.C. L. R. 4 I. A. 52 (cf. p. 61).

(s) *Anantha Tirtha Chariar v. Nagamuthu Ambalagaren*, I. L. R. 4 Mad. 200. See also *Promotho Dossee v. Radhika Persaud Dutt*, 14 B. L. R. 175.

(t) *Juggut Mohini Dossee v. Mussumat Sokheemoney Dossee*, 14 Moore's I. A. 289 (cf. p. 305).

(u) For some recent decisions as to what constitutes a valid *wuqf*, see *Mahomed Hamidulla Khan v. Lotful Huq*, I. L. R. 6 Calc. 744; *Luchmiput Singh v. Amir Alum*, I. L. R. 9 Calc. 176; *Abdul Ganne Kasam v. Hussien Miya Rahimtula*, 10 Bom. H. C. 7; *Fatmabibi v. The Advocate General of Bombay*, I. L. R. 6 Bom. 42; *Sayad Mahomed Ali v. Sayad Gobar Ali*, I. L. R. 6 Bom. 88.

(v) *Sookhdeo Doss v. Ameer-ood-deen*, S.D.A. (N.W.P.) 1853, p. 433; *Shoojat Ali v. Zuneerooddeen*, 5 W. R. 158. See Macnaghten's Mahomedan Law, 328; Baillie's Mahomedan Law (2nd Ed.) pp. 605 *et seq.* Also *Delroos Banoo Begum v. Nawab Syud Ashgur Ally Khan*, 15 B. L. R. 167.



When land subject to a mortgage is set apart as *wuqf*, the existence of the mortgage does not invalidate the endowment. The endowment is subject to the mortgage. If after having made a mortgage, the mortgagor dedicates the property as *wuqf* and dies leaving sufficient assets, his heirs are bound to apply them to the redemption of the mortgage, so as to set the endowment free. But if necessary, the mortgagee may enforce his mortgage by sale of the land: and the endowment will be rendered void as against the purchaser under the mortgage. But it will not be void as against the heirs of the grantor; as against the latter, the surplus proceeds will be subject to the endowment (*w*).

It has been held by the Allahabad High Court that Mahomedans entitled to frequent a mosque and to use the other religious buildings connected with the endowment are competent to sue to set aside a mortgage of the endowed property, and for the ejectment of the mortgagee who had purchased the property at a sale in execution of a decree enforcing the mortgage (*x*).

When *mutawallis* (superintendents or trustees) of *wuqf* property have been appointed, the property is subject to the management for secular purposes of the *mutawallis* for the time being. The office of a *mutawalli*, in the interval between the death of one *mutawalli* and the appointment of another, is not extinguished but in abeyance. The parties interested therefore as beneficiaries are not entitled themselves to assume the superintendence of the *wuqf*, and in the exercise of that function to maintain suits for its protection. They must, unless the settlor or his executor exercises his power of appointment, apply to the Court to fill the vacant office, and the *mutawalli* appointed by the Court must

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(*w*) *Shahazadi Hajra Begum v. Khaja Hossein Ali Khan*, 4 B. L. R. (a. c. j.) 86.

(*x*) *Zafaryab Ali v. Bakhtawar Singh*, I. L. R. 5 All. 497.

exercise his own judgment as to the steps to be taken for the protection of the property (*y*).

A true *wuqf* would appear to be irrevocable. The consequences of the dedication are that, even while the direct ownership is retained, the beneficial interest passes wholly from the appropriator. Should the intermediate purposes of the dedication fail, the rule of Mahomedan law appears to be that the final trust for charity does not fail with them. Charitable grants being thus tenderly regarded, it would be inconsistent that a power of revocation should be recognized in the grantor (*z*).

Though, under sec. 9 of the North-Western Provinces Rent Act, 1873, (Act XVIII of 1873), an "occupancy tenant" in those Provinces, cannot, unless he be a tenant at fixed rates, transfer his right of occupancy by grant, will or otherwise, except to a person, who has become by inheritance a co-sharer in such right, it would seem that, he may nevertheless hypothecate his right to a stranger. For it has been held by a Full Bench of the Allahabad High Court (*Mahmood*, J., dissenting) that a simple mortgage by an occupancy tenant of his right of occupancy is not a "transfer" within the meaning of that section (*a*).

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(*y*) *Phate Saheb Bibi v. Damodar Premji*, I. L. R. 3 Bom. 84.

(*z*) *Fatmabibi v. The Advocate General of Bombay*, I. L. R. 6 Bom. 42.

(*a*) *Gopal Pandey v. Parsotam Das*, I. L. R. 5 All. 121. Though this decision was strictly limited to the case of a simple mortgage, the principles on which the judgments of the majority of the Court were based would appear to govern also the case of all mortgages.

## CHAPTER IV.

### OF MORTGAGE CONTRACTS.

PREVIOUS to the 1st July 1882 when the Transfer of Property Act, 1882, (Act IV of 1882) came into force, parties might throughout India enter into a contract of mortgage in the same manner as they might make any other contract, that is to say, their agreement might be either verbal or in writing. And this is the state of the law still in the Presidency of Bombay, the Punjab, and British Burma, to which provinces the Transfer of Property Act, 1882, does not at present extend (a). In all such cases proof of the existence of the contract is all that is necessary, and if satisfactorily established, a verbal agreement will be given effect to (b).

At the same time, verbal contracts are so open to misconstruction and fraud, and there is so much difficulty in proving them after a long lapse of time, that they are to be especially distrusted in the case of mortgages of land, where disputes seldom arise until some considerable period has passed. Moreover, all documents, not testamentary, duly registered under the Registration Act, and relating to any property, whether movable or immovable, take effect against any oral agreement or declaration relating to the same property unless where the agreement or declaration has been accompanied or followed by delivery of possession (c).

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(a) See sec. 1 and for the mode in which mortgages must be effected under the Act, see sec. 59.

(b) *Meerza Mookhunnud Ali v. Nawab Soulut Jung*, 4 Sel. Rep. 168. See also *Sham Singh v. Mussumaut Umraotee*, 2 Sel. Rep. 74; *Mussumat Ummun Bebee v. Moulvee Mohamed Oomer*, S.D.A. (N. W. P.) 1849, p. 219; *Sheikh Rahmatulla v. Sheikh Sariutulla Kagchi*, 1 B. L. R. (F. B.) 58 (cf. p. 64); S. C. 10 W. R. (F. B.) 51.

(c) The Indian Registration Act (Act III of 1877,) sec. 48.

Consequently mortgages by mere verbal agreements are seldom met with in practice: and no mortgagee is safe unless he has a written instrument of mortgage duly registered.

A deposit of title deeds as security for money, in English law known as an "equitable mortgage," is treated as a valid simple mortgage of the whole property to which the deeds deposited refer, and is subject to the same rules as an ordinary simple mortgage (*d*).

A sum of money was paid as a loan, and thereupon (at the time of receipt of the money) title deeds were deposited by way of security for the repayment of the advance. It was held that this was a complete equitable mortgage, and that the mortgagee was entitled to a decree upon it, although he subsequently took from the mortgagor a written memorandum of deposit, which was not registered, as it was necessary it should have been before it could be put in evidence (*e*). But this case turned entirely on the special circumstances proved: and as a general rule there is no doubt that if there is any written document of deposit or mortgage, it ought to be registered. In another case,—upon the date on which a sum of Rs. 20,000 was repayable,—the debtor sent his creditor the title deeds of certain property, along with a letter, in which he stated that he sent the deeds as a collateral security for the debt which he was unable to pay. It was held that the letter could not be separated from the deposit of the title deeds, and that registration was necessary. The Court observed: "This is not a case in which the charge on land is implied

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(*d*) *Laljee v. Govind Ram Janee*, 6 Sel. Rep. 165. See the judgment of the Privy Council in *Varden Seth Sam v. Luckpathy Royjee Lallah*, Marsh. 461, S.C. 9 Moore's I. A. 303; *Guneshee Lall v. Buldeo Singh*, S.D.A. (N.W.P.) 1852, p. 450; and *cf.* the Transfer of Property Act (Act IV of 1882), sec. 59, para. 3.

(*e*) *Kedarnath Dutt v. Shamloll Khettry*, 11 B. L. R. 405 (*cf.* p. 412).

from the deposit of the deeds themselves, neither is it a case where the charge or the equitable mortgage is made expressly by parol (*f*).”

Where an equitable mortgage by deposit of title deeds had been made, the mortgagee executed an assignment of all his property and of all debts due to him, and all the securities therefor, to the plaintiff. The assignment also contained a power-of-attorney from the mortgagee to the plaintiff, empowering the latter to recover in the name of the mortgagee, but for his own benefit, the sum and sums of money and debts thereby assigned, or intended so to be, or any of them, or any part of any of them. Some time after the execution of the assignment, the title deeds, which had been deposited with the mortgagee, were handed to the plaintiff in accordance with the terms of an agreement to that effect contained in the assignment. The deed of assignment was not registered. The High Court of Bombay in its Original Jurisdiction (*Sargent, J.*) held that the deed of assignment required registration, and that not being registered it could not be received in evidence; that under section 91 of the Evidence Act no evidence other than that contained in the document itself could be given to prove the fact of the assignment; and that, therefore, the plaintiff had failed to show a title to sue as assignee of the equitable mortgage. The Court, however, permitted an amendment of the plaint by which the plaintiff was described as suing “in his own name and as the constituted attorney of P. D.” (the mortgagee), and then allowed the deed of assignment to be put in as evidence of the power thereby conferred on the plaintiff to sue for and recover all debts due to the mortgagee, and therefore to maintain the present suit in respect

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(*f*) *Dwarkanath Mitter v. S. M. Sarai Kumari Dasi*, 7 B. L. R. 55. See as to the deposit of title deeds; *Somasundara Tambiran v. Sakkarai Pattan*, 4 Mad. H. C. 369; *Azim-Un-Nissa Begum v. Clement Dale*, 6 Mad. H. C. 455.

of the equitable mortgage ; but the Bench, to which the case went on appeal, held that the plaintiff could not treat the power-of-attorney contained in the deed of assignment as enabling him to maintain a suit on the mortgage, inasmuch as that power-of-attorney purported to enable him to recover for his own benefit, and to give it that effect would be, to all practical purposes, to treat it as an assignment, but that the deed could not be used for that purpose inasmuch as it had not been registered (*g*).

In all cases, much risk and confusion are avoided by having a short and accurate deed, attested by at least two credible witnesses, and duly registered, which may itself testify to the real facts and the intentions of the parties contracting.

A mortgage deed should set forth shortly, but distinctly, all the material points of the agreement into which the parties really intend to enter (*h*). It should state with strict accuracy, the consideration given, the locality and description of the property pledged (*i*), the nature of the mortgage, the length of time it is to remain in force, and any other conditions which the parties may have agreed upon, together with the date of the execution of the deed.

The stipulations as to the payment of interest should be accurate and clear : for interest will not be allowed unless it is included in the agreement. Thus in a case where the mortgagee had not the usufruct of the property, the mortgage deed was silent on the subject of interest : and the Court on account of this silence refused to allow any inter-

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(*g*) *Ganpat Pandurang v. Adarji Dadabhai*, I. L. R. 3 Bom. 312.

(*h*) For precedents of mortgage deeds of different kinds, see Appendix.

(*i*) *Deojit v. Pitambar*, I. L. R. 1 All. 275 (cf. p. 277). As to the description of parcels, the provisions of sec. 21 of the Registration Act (Act III of 1877) must be kept in view.

est from the date of the deed up to the time when the money lent became re-payable (*j*).

Where the contract is only for the payment, on a day certain, of money borrowed with interest at a certain rate down to that day, a further contract for the continuance of the same rate of interest after that day until actual payment is not to be implied. When, therefore, the agreed rate of interest is excessive and extraordinary, the Court will reduce the rate to a reasonable amount (*k*). But where a mortgage contains a clear stipulation for the payment of interest until repayment of the principal sum secured by the mortgage, the mortgagee is entitled to recover the agreed rate of interest without any deduction up to the date of decree (*l*).

An agreement to mortgage contained a provision that, until the formal mortgage deed should be executed, containing all such covenants, provisions, stipulations and agreements as are usually or properly introduced into mortgages of estates of a similar nature, the mortgaged property should remain charged with the amount of the loan, and the mortgage agreement should be considered as a deed of mortgage. Under the agreement the money lent on mortgage, together with interest at 18 per cent., was to be paid within one year from the date of the agreement, and the agreement further provided that the interest was to be payable in four

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(*j*) *Baboo Juggutputtee Singh v. Madho Singh*, S.D.A. 1855, p. 54. See *Baboo Ramrutton Roy v. Baboo Goordass Roy*, S.D.A. 1854, p. 514; *Baboo Goordass Roy v. Baboo Ramrutton Roy*, S.D.A. 1854, p. 518; *Heera Ram v. Raja Deo Narain Singh*, N.W.P. (Agra) H. C. (F.B.) 63 (cf. p. 68); *Prosunno Coomar Mookerjee v. Baboo Buldeo Narain Singh*, 18 W. R. 62.

(*k*) *Nanchand Hansraj v. Bapusaheb Rustambhai*, I. L. R. 3 Bom. 131. See also *Gossain Luckmee Narain Pooree v. Tekait Het Narain Singh*, 18 W. R. 322.

(*l*) *Futichma Begum v. Mohamed Ausur*, I. L. R. 9 Calc. 309.



quarterly instalments, and that if any instalment was not paid on the due date, compound interest was to be allowed thereupon. It was held that, inasmuch as if a formal mortgage deed had been executed, it would have been a usual and ordinary covenant to insert in such a deed that interest should be paid on the principal sum for any time during which such sum remained unpaid after the expiry of the year fixed for payment, at the rate of 18 per cent., specified in the agreement, the mortgagee was entitled to recover interest at this rate until the principal sum was realized from the mortgagor. The Court, however, refused to agree with a contention that under the terms of the agreement compound interest also was recoverable (*m*).

If more deeds than one are requisite in order to carry out the arrangement between the parties, but all of them forming part of the mortgage contract, each should contain a reference to the others, so that it may appear on the face of them that they all are but one transaction and must be taken in connection with each other. For example, in making a mortgage by conditional sale, it is a common custom to make an absolute sale of the property, and at the same time to execute an *ikrarnama*, declaring the sale to be only conditional and made in fact by way of mortgage. A reference in each of these deeds to the existence and purport of the other will be preventive of fraud and a protection to all parties (*n*).

If the *ikrarnama* is substantially part of the original arrangement, the fact that it is dated two days after the principal deed which purports to be one of absolute con-

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(*m*) *Manickya Moyee v. Boreda Prosad Mookerjee*, I. L. R. 9 Calc. 355 (cf. p. 360).

(*n*) *Rajah Heera Singh v. Sahoo Luchmun Dass*, S.D.A. N.W.P. 1853 p. 564; *Manoo v. Sheikh Kadir Buksh*, S.D.A. N.W.P. 1855 p. 223; *Beharee Lal v. Mussummaut Sookhun*, 4 Sel. Rep. 174. See also *Ram Saran Lal v. Amirta Kuar* I. L. R. 3 All. 369.

veyance, does not prevent the transaction being one of mortgage only (o). And three deeds all executed on different dates, viz., a lease of the 16th of May, a mortgage deed of the 5th of June, and an ikrarnama of the 29th of August, have been held together to make up one mortgage transaction (p).

A mortgage deed was executed in the ordinary form. Two days afterwards the mortgagees executed an ikrarnama in which they undertook to pay Rs. 110 to the mortgagors as subsistence money. The latter instrument did not mention, and was not mentioned in, the former. The mortgagees subsequently transferred their rights under the first deed to third parties. It was held that these assignees were not liable to pay the subsistence money. "There is nothing whatever to connect this subsequent engagement with the mortgage deed, nor can any privity of contract between the original mortgagors and the parties to whom the mortgage was afterwards transferred by deed, be inferred from the evidence or circumstances of the case" (q).

It used to be held that the terms of a written deed might be varied or modified by a verbal agreement, and that a deed which on the face of it was one of absolute sale, might by a verbal agreement be converted into one of mortgage (r).

More recently it was held that parol evidence was not admissible to vary or alter a written contract, in cases

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(o) *Tewaree Loll v. Kasseenauth*, 2 Hay, 256; S.C. W. R. Sp. 79.

(p) *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 12 Moore's I. A. 157.

(q) *Nehram v. Doulut*, S.D.A. N.W.P. 1856, p. 6.

(r) *Sheebkishore Muzmoodar v. Pertabnarain Nundee Chowdree*, S.D.A. 1858, p. 741. See *Rychund Bunik v. Greesh Chunder Goho*, S.D.A. 1859, p. 362; *Jadub Sirdar v. Kishenhuree Chatterjee*, S.D.A. 1861, vol. I, p. 189; *Ramecoomar Roy Chowdhry v. Kashee Chunder Sein*, 1 Hay, 325; *Khyalee Ram v. Ramdyal*, S.D.A. N.W.P. 1853, p. 473.

where there was no fraud or mistake, and in which the parties intended to express in writing that which their words imported. Therefore where there was a written bill of sale, absolute on the face of it, a contemporaneous verbal agreement that the transaction should be one of mortgage only, was not admissible in evidence (s). But a prior written contract might be varied by a subsequent verbal one, in cases in which the law did not require the contract to be in writing (t). And parol evidence was admissible to explain the acts of the parties (u).

When the deed of sale stated that the purchase money "was paid and it was necessary to give possession to the purchaser," but possession was not given, and the seller remained quietly in possession for two years, it was held that the sale had never been completed, and that it was open to the plaintiff to show that this was so and that the money was not paid (v).

The present law on this subject is to be found in the Indian Evidence Act (Act I of 1872), which provides (w) that when the terms of any contract, grant, or disposition of property, which has been reduced to the form of a document, have been proved (x), no evidence of any oral agreement or

(s) *Kasheenath Chatterjee v. Chundi Churn Banerjee*, 5 W. R. 68 (F. B.); *Moolook Chand Surma v. Kooloo Chunder Surma*, 5 W. R. 76 (F. B.). See also *Mahomed Azeem v. Raesooddeen*, 6 W. R. 111; *Durya v. Mohur Singh*, 2 N.W.P. (Agra) H.C. 163; *Madhab Chandra Roy v. Gangadhar Samant*, 3 B. L. R. (a. c. j.) 83; S.C. 11 W. R. 450.

(t) *Kasheenath Chatterjee v. Chundy Churn Banerjee*, 5 W. R. 68 (F. B.)

(u) *Ibid.* pp. 71, 72.

(v) *Dookha Thakoor v. Ram Lal Sahee*, 7 W. R. 408. See also *Mussamut Ram Deye Koor v. Baboo Bishen Dyal Singh*, 8 W. R. 339.

(w) Sec. 92.

(x) As to how a contract &c. reduced to writing is to be proved,

statement shall be admitted as between the parties to such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from, its terms. But any fact may be proved which could invalidate the document, or which could entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law (*y*). And the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms,—or the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under the contract, grant or disposition of property,—may be proved (*z*). So also may the existence of any distinct subsequent oral agreement to rescind or modify any contract, grant or disposition of property except in cases in which the contract, &c., is by law required to be in writing, or has been registered according to law (*a*). And any usage or custom, by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved, if not repugnant to or inconsistent with the express terms of the contract (*b*).

It is clear that under this section direct evidence of an oral agreement inconsistent with the terms of the written agreement which the parties have entered into is not admissible (*c*). But the question how far evidence of the acts and conduct of the parties to a written contract is admissible

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see sec. 91, and *Ganpat Pandurang v. Adarji Dadabhai*, I. L. R. 3 Bom. 312 (cf. p. 318).

(*y*) Sec. 92, Proviso 1.

(*z*) *Ibid.* Provisos 2 and 3.

(*a*) *Ibid.* Proviso 4.

(*b*) *Ibid.* Proviso 5.

(*c*) *Banupa v. Sundardas Jagjivandas*, I. L. R. 1 Bom. 333;

under the section for the purpose of varying, adding to, or subtracting from the terms of that contract, is one concerning which there has been some conflict of decision. On the one hand, it has been held in some Calcutta cases that such evidence is inadmissible, being in violation of the terms of the section (d). On the other hand a Bench of the Bombay High Court, after comparing and considering the previous decisions both of that Court and of the High Court of Calcutta, with reference not only to each other, but also to the established practice of Courts of Equity in England, has ruled that, though a party, who sets up a contemporaneous oral agreement as showing that an apparent sale was really a mortgage, shall not be permitted to start his case by offering direct parol evidence of such parol agreement, still, if it appear, clearly and unmistakeably, from the conduct of the parties that the transaction has been treated by them as a mortgage, the Court will, in accordance with the obligation laid upon it as a Court of Equity to prevent the perpetration of fraud, and even if, in order to establish this equitable jurisdiction, it is necessary to trench upon the provisions of the Evidence Act, give effect to the transaction as a mortgage and not as a sale; and thereupon, if it be necessary to ascertain what were the terms of the mortgage, the Court will, for that purpose, allow parol evidence to be given of the original oral agreement (e).

And the view expressed in this ruling has now been

*Baksu Lakshman v. Govinda Kanji*, I. L. R. 4 Bom. 594 (cf. p. 598); see also *Moran v. Mittu Bibee*, I. L. R. 2 Calc. 58 (cf. p. 89).

(d) *Daimoddee Paik v. Kaim Taridar*, I. L. R. 5 Calc. 300; see also *Ram Doyal Bagpie v. Heera Lal Paray*, 3 C. L. R. 386.

(e) *Baksu Lakshman v. Govinda Kanji*, I. L. R. 4 Bom. 594 (cf. p. 609); see also *Bapuji Apaji v. Senavaraji Marvadi*, I. L. R. 2 Bom. 231; *Hasha Khand v. Jesha Premaji*, I. L. R. 4 Bom. 609 note, also reported as *Govinda v. Jesha Premaji*, I. L. R. 7 Bom. 73; *Mahadaji Gopal Baklekar v. Vithal Ballal*, I. L. R. 7 Bom. 78.

accepted by the Calcutta High Court, which has recently held that sec. 92 of the Indian Evidence Act made no alteration in the law on this point which prevailed before the Act was passed, and therefore evidence of the circumstances under which an instrument, which purported to be an out and out sale, was executed, and of the conduct of the parties, was admissible to show that the document had all along been treated as a mortgage and was intended to operate as such (*f*). But as this rule turns on the fraud which is involved in the conduct of the person who is really a mortgagee and who sets himself up as an absolute purchaser, the rule of admitting evidence for the purpose of defeating this fraud does not apply to an innocent purchaser without notice of the existence of the mortgage, who merely bought from a person who was in possession of the title deeds and was the ostensible owner of the property (*g*).

The Courts appear to be undecided on the question as to whether the fraud referred to in the first proviso to the section must be fraud contemporaneous with, and not subsequent to, the making of the document. This is the view which was taken by *Garth*, C.J., in a case in which he dissented from the opinion of *Pontifex*, J., who held that it would be a fraud on the part of the plaintiffs to insist on the performance by the defendants of a written agreement, which the defendants had entered into, without at the same time securing to the defendants the performance of certain verbal conditions which they alleged that the plaintiffs had promised to perform (*h*). The opinion of *Garth*, C.J., is in accordance with a decision of the Bombay High Court (*Westropp*, C.J., and *Kemball*, J.) where these learned Judges declared that to hold a subsequent fraud to be such

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(*f*) *Hem Chunder Soor v. Kally Churn Das*, I. L. R. 9 Calc. 528.

(*g*) *Kashi Nath Dass v. Hurrihur Mookerjee*, I. L. R. 9 Calc. 898.

(*h*) *Cutts v. Brown*, I. L. R. 6 Calc. 328.

a fraud as is contemplated by the proviso would be to render the section nugatory (*i*). But in a recent Bombay case *Melville, J.*, has advanced an opinion that the words of the proviso are large enough to let in evidence of such subsequent conduct as in the view of a Court of Equity would amount to fraud and would entitle a grantor to a decree restraining the grantee from proceeding upon his document (*j*).

The true meaning of the words "any obligation" in proviso 3 to the section is any obligation whatever under the contract, and not some particular obligation which the contract may contain, as to admit parol evidence to prove that some particular stipulation cannot be enforced would be to introduce the mischief, which sec. 92 was intended to prevent (*k*).

The rule laid down in sec. 92 of the Evidence Act would seem to apply only where, upon the face of it, the written instrument appears to contain the whole contract (*l*). So where in an instrument of mortgage the consideration was recited to be that the mortgagee would pay certain debts, but the instrument was not signed by the mortgagee and contained no promise by him that he would make such payments, it was held that, as it did not appear that the instrument was intended to contain the whole of the agreement between the parties, sec. 92 of the Evidence Act did not apply, and oral evidence was admissible to show the

(*i*) *Banapa v. Sundardas Jagjivandas*, I. L. R. 1 Bom. 333 (cf. p. 338).

(*j*) *Baksu Lakshman v. Govinda Kanji*, I. L. R. 4 Bom. 594 (cf. p. 608).

(*k*) *Jugtanund Misser v. Nerghan Singh*, I. L. R. 6 Calc. 433; see also the remarks of Hutchins, J., in *Tiruvengada Ayyangar v. Rangasami Nayak*, I. L. R. 7 Mad. 19 (cf. p. 22).

(*l*) *Per Garth, C.J.*, in *Cutts v. Brown*, I. L. R. 328 (cf. p. 337).



nature of the agreement which formed the consideration for the mortgage (*m*).

It has been held that sec. 92 of the Evidence Act does not prevent a party to a contract from showing that there was no consideration, or that the consideration was different from that described in the contract (*n*), or from giving evidence, when the mortgage deed was indistinct on the point, as to what was the property, a share of which was mortgaged (*o*).

Contracts are to be dealt with and deeds construed according to the real intention of the contracting parties disclosed by the transaction (*p*). It is therefore not necessary that a mortgage should be called a mortgage by name, or that the class to which it belongs should be expressly stated. An agreement that "until the amount of the bond shall be paid, the debtor will not transfer certain property by sale, mortgage, or gift," has been held to be a simple mortgage of the property mentioned. So, a money bond containing a stipulation that until the money was re-paid, the debtor would not alienate his rights as zemindar in any other quarter, was held to be a bond in the nature of a simple mortgage (*q*). But all depends upon the terms of

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(*m*) *Tiruvengada Ayyangar v. Rangasami Nayak*, I. L. R. 7 Mad. 19.

(*n*) *Hukumchand v. Hiratal*, I. L. R. 3 Bom. 159.

(*o*) *Ram Lal v. Harrison*, I. L. R. 2 All. 832.

(*p*) See the case of *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*, 6 Moore's I. A. 393 (cf. p. 411); see also the quotation from Butler's edition of Coke upon Littleton in the case of *Bapuji Apaji v. Senavaraji Marvadi*, I. L. R. 2 Bom. 231 (cf. p. 244).

(*q*) *Rajkumar Ramgopal Narain Sing v. Ram Dutt Chowdhry*, 5 B. L. R. 264 (F. B.); *Dooleychand v. Hurdeo Suhai*, S.D.A. N.W.P. 1852 p. 124; *Jalapershad v. Chowbe Hurbuns Rae*, S.D.A. N.W.P. 1853, p. 669; *Bolakee Lal v. Chowdhry Bungsee Singh*, 7 W. R. 309; *Martin v. Pursram*, 2 N. W. P. (Agra) H. C. 124.

the contract between the parties and its being clear that the intention was to create a mortgage.

This question was much discussed in a case (r) in which the majority of a Full Bench Court were of opinion that the language used in the deed, which was the subject of suit, showed that it was the intention of the parties, that the lands mentioned should be a security for the debt, and that if the intention could be collected from the instrument, the form of expression was not material (s). And a bond for the payment of money with a simple covenant not to alienate certain lands until payment, does not constitute a mortgage unless there is something in the document to show that the intention was to pledge the lands by way of security. In the absence of the expression of any such intention such a covenant amounts only to an arrangement not to alienate any part of the property until the debt is paid (t).

The decision of the question, which sometimes arises, whether a transaction is to be deemed a mortgage by way of conditional sale or an absolute sale, to which is attached a conditional right of repurchase, rests on similar principles.

Where the grantor executed to the grantee a document reciting a mortgage by the former to the latter of certain lands for Rs. 125, on which Rs. 200 were then due from the grantor to the grantee, and containing an agreement that the grantee should pay Rs. 75 to another creditor of the grantor, and purporting, in consideration of the Rs. 275

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(r) *Rajkumar Ramgopal Narain Sing v. Ram Dutt Chowdhry*, 5 B. L. R. 264 (F. B.), and see the various cases there quoted.

(s) *Ibid.* p. 272.

(t) *Gunoo Singh v. Latafut Hossain*, I. L. R. 3 Calc. 336; *Bhupal v. Jag Ram*, I. L. R. 2 All. 449; see also *Ganga Prasad v. Kusyari Din*, I. L. R. 1 All. 611 (cf. p. 613).

so made up, absolutely to sell and convey the mortgaged lands to the grantee, and the grantee executed to the grantor a document of the same date, reciting the sale of the mortgaged lands by the grantor to the grantee for the consideration of Rs. 275, and covenanting that the grantee should reconvey to the grantor the lands, the subject of the grant, if the grantor should repay to the grantee the sum of Rs. 275 within a certain period, and providing that in case of default in such payment within such period, the covenant for reconveyance should become null, it was held by the High Court of Bombay that the transaction was a sale and not a mortgage, and that, consequently, the grantor had no right to redeem the lands after the expiration of the period so fixed for the payment of Rs. 275 by the grantor to the grantee. None of the *indicia*, from which a Court may infer that a transaction must have been of the nature of a mortgage and not a sale, were observable. There was no evidence or allegation that, at the date of the execution of the two documents, Rs. 275 were an insufficient consideration for the sale of the lands, nor was there any stipulation that the grantee should account for the rents and profits received by him, or that the grantor should pay interest on the Rs. 275, nor anything to show that the grantor remained in possession after the execution of the two documents, or that subsequently to that time any advances were made by the grantee to the grantor on the security of the lands nor anything in either document which pointed to a right on the part of the grantee to recover from the grantor the sum of Rs. 275 or any part of it, before, at, or after the period named for the repurchase (u).

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(u) *Bapuji Apaji v. Senavaraji Marvadi*, I. L. R. 2 Bom. 231 ; and compare the recent decision of the Privy Council in *Situl Purshad v. Luchmi Purshad*, I. L. R. 10 Calc. 30 (P. C.) ; and see *Bhup Kuar v. Muhammadi Begam*, I. L. R. 6 All. 37.

But where the co-sharers of a certain estate sold it to the defendant, and on the same day as the vendors executed the conveyance to the defendant, the latter executed an instrument whereby he declared that the vendors might, subject to certain conditions, within a certain time, repay the sale consideration, and in such case the deed of sale would be considered cancelled, or that any one of the vendors might repay his quota of the sale consideration as specified in the deed of sale, and in such case the sale in respect of his share should be invalid; but that if the sale consideration was not paid at the time fixed, *and he had to foreclose and bring a suit*, he should be entitled to realize the costs from the vendors personally and from their other property—a Full Bench of the Allahabad High Court held, in a suit by an alienee of the heir of one of the vendors for the redemption of the share of such vendor, after the time fixed for the repayment of the sale consideration, that in face of the agreement as to redemption, it was impossible to hold that there was any sale. The complexity given to the bargain between the parties by the execution of two instruments, one qualifying the other, could not alter its true character, the precise legal description of which must be determined by reading both of them as a single and indivisible contract. The relationship created thereby between the parties was essentially that of mortgagors and mortgagee, and until the mortgagee took the prescribed steps to foreclose and establish his absolute proprietorship, their relative positions continued the same, and down to the last day of the twelve months' period of notice of foreclosure the rights of the mortgagors or those acquiring their interests remained in existence and could at any moment be exercised. The substance of the contract was the pledge of the estate for the debt, and the time of its repayment was not of its essence, and Courts of Equity invariably relieve against the forfeiture of the estate by sanctioning redemption at any time upon paying

the mortgage debt with interest. The Chief Justice, however, though not recording a dissent from the opinion of his colleagues, expressed a doubt whether the transaction should not be considered to be an absolute sale to which was attached a conditional right of repurchase within a fixed period (*v*). It would seem questionable whether the reason assigned by the Full Bench, *viz.*, the fact that the purchaser reserved to the vendors a right to repurchase the property within a certain time, or, as the Court called it, a right of redemption, was of itself sufficient to support the decision that the transaction in question was a mortgage and not a sale. As pointed out by the Bombay High Court, a mere stipulation, (unaccompanied with any other indication that the transaction was a mortgage) that, should the repurchase take place, the original purchase money shall be repaid even with the addition of interest, is insufficient to stamp a case as one of mortgage and not of sale (*w*). The decision of the Full Bench may perhaps, however, be supported on the ground that in this case there were other indications, notably the fact that the purchaser contemplated the necessity of a foreclosure suit if the money were not repaid at the time fixed, which showed that the transaction was a mortgage and not a sale.

On the other hand the fact that a deed is described on its face as a mortgage will not constitute it one unless the contents warrant that description. Where a deed, which on the face of it was described as a mortgage, stated that the grantee was already in possession under a previous mortgage by the grantor, and was under the second deed to receive the profits in liquidation of interest so far as they would go, and that the grantor was not to be liable to repay

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(*v*) *Ram Saran Lal v. Amirta Kuar*, I. L. R. 3 All. 369.

(*w*) *Bapuji Apaji v. Senavaraji Marcudi*, I. L. R. 2 Bom. 231 (cf. p. 246).

the principal money or such balance of interest (if any) as might accrue upon it, unless he adopted a son, and the grantee, unless that event happened, was to enjoy the property conveyed in right of purchase for the sum (principal and interest) due to him, it was held by the Bombay High Court that the transaction was not a mortgage but a sale. The sale was, however, liable to be converted into a mortgage by the grantor's adoption of a son (x).

So long as the nature of a transaction is substantially such as to stamp it as belonging to a particular class of mortgage, the mere calling it by a different name will not transfer it to another class. Thus, where there was an absolute sale, but the purchaser gave an *ikrarnama* with a condition that if the vendor re-paid the purchase money and interest by a fixed day, the purchaser would re-convey the estate to him, it was contended that this was a redeemable sale only, and not a mortgage by conditional sale, nor governed by the rules applicable to such mortgages. But the Court held, that "redeemable sales," and "mortgages by conditional sale," were in their nature identical, and merely different modes of expressing the same thing, and that therefore a redeemable sale could be foreclosed only in the same manner as a mortgage by conditional sale (y).

A mortgage in the common English form has been held to fall within the operation of Reg. XVII of 1806: and notice of foreclosure must be given, and the year of grace allowed. Such a mortgage "is in all respects parallel with the mortgage common in this country which is effected by

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(x) *Subhabhat bin Babanbhat v. Vasudevhat bin Subhabhat*, I. L. R. 2 Bom. 113.

(y) *Rajah Heera Singh v. Sahoo Luchmun Dass*, S.D.A. N.W.P. 1853, p. 564. See also *Beharee Lal v. Mussummat Sookhun*, 4 Sel. Rep. 174; *Radhabenode Misser v. Kripa Moyee Debea*, 14 Moore's I.A. 443 (cf. p. 448).

means of a bill of absolute sale together with a contemporaneous ikrar for re-conveyance: and mortgages of this sort have always been treated as subject to the Regulation" (z).

So, zur-i-peshgee leases are treated in all respects as usufructuary mortgages (a), when they contain a proviso either express or manifestly implied, for redemption. But when the mortgage is by way of lease, it is desirable that the deed should declare expressly that the lease is in fact given as a mortgage security: and there should be a condition that if the advance is not re-paid when the lease expires, the mortgagee shall be entitled to hold on, until his claim is satisfied. Where there was no such condition, but on the contrary it was stipulated that if at the expiration of the term for which the lease was granted, the lessor failed to pay down at one time the whole amount of the advance made, the lessee should be at liberty to take such steps as might be deemed proper to recover the amount from the lessor,—it was held that the absence of a proviso that the lease should continue until re-payment, more especially when the deed contained a condition that the amount might be recovered from the mortgagor, distinguished and removed the case from the ordinary category of leases held to be usufructuary mortgages (b). So the simple advance of Rs. 500 in consideration of receiving

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(z) *Srimati Sarasibala Debi v. Nand Lal Sen*, 5 B. L. R. 389 (cf. p. 393). See also *Manly v. Patterson*, I. L. R. 7 Cal. 394 (cf. p. 400).

(a) *Supra*, Chap. II. See also *Baboo Koonwur Singh Bahadoor v. Doollun Umrith Koonwur*, S.D.A. 1857, p. 1232; *Mussumat Ghuseetun v. Mussumat Imam Bandee Begum*, S.D.A. 1859, p. 977; *Kishto Coomer Singh v. Chowdree Beeraj Singh*, 2 Hay, 159; *Punjum Singh v. Musst. Ameena Khatoon*, 6 W. R. 6; *Mussamut Mujee-dunnissa v. Syud Dildar Hossein*, 20 W. R. 178.

(b) *Kirparam v. Mouzuma Beebee*, S.D.A. N.W.P. 1853, p. 356.



a lease for twelve years was held not to be a mortgage transaction, in the absence of any appearance of intention that it should be taken as such (c). In another case a lease for twenty years was granted, which provided that on the expiry of the twenty years the land should be made over to the lessor, and that the lessee alone should benefit by any improvement of the property or increase in the rents, and should bear any loss of rents or decrease in their amount. The Court said (d): "The deed before us is in fact an absolute sale of a lease for a fixed period, to which the rules common to mortgage transactions cannot be applied, as the extinction of the original debt is not solely dependent on the receipt of adequate profits, but on profits *whatever they may be* during the continuance of the lease. Should they fail, the debt is neither realisable from, nor secured by, any other resources: this is no device, but a substantial risk entitling the lender to any benefit from the bargain."

The defendant agreed, by an instrument in writing, that in consideration of a loan from the plaintiff, the plaintiff should have the right of cultivating indigo on certain land, in the mauza of the defendant, from a certain date for a certain period; that if the defendant failed to make over to the plaintiff any portion of such land, or interfered with his cultivation of any portion of it, the defendant should be responsible in damages for the loss occasioned to the plaintiff in respect of such default or interference at a certain rate per bigha and for the repayment of such loan, and "that, if the defendant failed to pay, the plaintiff was at liberty to recover from her person and property, and that

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(c) *Sreemunth Lall Panjah v. Oodoychand Dey*, S.D.A. 1855, p. 481.  
See also *Sreemunt Dutt v. Krishna Nath Roy*, 25 W. R. 10.

(d) *Baboo Koonwur Singh Bahadoor v. Doollun Umrit Koonwur*, S.D.A. 1857, p. 1232.

until the conditions of the agreement were fulfilled, the defendant hypothecated her four-anna share in the mauza." It was held by *Stuart*, C.J., of the Allahabad High Court, in a suit by the plaintiff against the defendant, to recover the amount of such loan and damages by sale of such four-anna share, that the transaction was a usufructuary mortgage of the nature of a zur-i-peshgee lease. *Oldfield*, J., was however of opinion that the first portion of the instrument was simply a lease or agreement to lease and not a zur-i-peshgee lease, though the last portion of the instrument undoubtedly effected a mortgage of a four-anna share of the mauza (e).

Lands were conditionally purchased by *A*, who paid down a certain sum of money and agreed to pay a further sum seven years afterwards: upon making the latter payment, *A* was to be put in possession, and the borrowers were within ten years from that date to pay off the whole loan and redeem their lands. *A* never advanced more than the first sum, and he never got possession. It was held that the transaction did not amount to a mortgage, and that the money which *A* advanced was a simple debt for which there was no lien on the lands (f).

A *malguzar* of a village in the Central Provinces mortgaged it by a deed in which he declared,—“if I fail to pay the money as stipulated I and my heirs shall without objection cause the settlement of the said village to be made with you.” It was contended that this amounted to a conditional sale. But the Privy Council held that it was only a simple mortgage hypothecating the right of the party to the village, and that the deed was not meant to operate by way of conditional sale. Their Lordships remarked that at the time the deed was executed the

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(e) *Basant Lal v. Tapesri Rai*, I. L. R. 3 All. 1.

(f) *Rambilash Singh v. Beebee Asmut Jehan*, S.D.A. 1858, p. 1491.

malguzar's right in the village was such that the consent of the Revenue officers would have been required in order to carry out such a stipulation: but that supposing the malguzar had had full proprietary rights "the instrument would not, like an ordinary deed of conditional sale, have imported in terms a sale of the interest of the party which was to become absolute and conclusive upon his failure to pay the stipulated sum at a certain date. Such a contract would independently of any rule of law to the contrary execute itself: and the remedy of the party upon it would, if he were out of possession, be a suit for possession." Again,— "If the security was in the nature of a simple mortgage the proper course for the mortgagee to pursue was to raise the amount for which they had obtained a decree by the sale of the village, paying the surplus proceeds, if any, to the mortgagor" (g).

A borrowed money from B, and by deed (in which nothing was said about interest) agreed that if he did not repay the sum borrowed on a day specified he would give the lender a putni lease of certain lands, the original sum borrowed being deemed the *bonus* for such lease,—and that if A did not grant the putni, then the deed of agreement itself should be deemed a putni pottah of those lands. A did not pay the money and did not grant a putni lease. It was held that the transaction was in no sense a conditional sale, but that B was entitled to possession as on the footing of a putni from the date of suit, though the putni would be redeemable (h).

By the terms of an instrument, mortgaging an estate, it was agreed by the mortgagor that, if he failed to pay the mortgage money within the time fixed, he would convey the estate to the mortgagee, and that, if he failed to execute

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(g) *Gokuldoss v. Kriparam*, 13 B. L. R. 205 (cf. pp. 210 and 212).

(h) *Juseemooddeen Biswas v. Huro Soonduree Dossee*, 19 W. R. 274.

such conveyance, the mortgagee should be competent to bring a suit "to get a sale effected and a deed of absolute sale executed." In a suit by the mortgagee for the execution of a conveyance of the estate to him in accordance with the agreement, it was held that the transaction was not in the nature of a mortgage by conditional sale; that there was, therefore, no necessity for the mortgagee to take proceedings to foreclose the mortgage; and that the suit was maintainable. The terms of the latter part of the instrument precluded proceedings for foreclosure, and the Court saw no reason to regard them as amounting to more than an ordinary contract to do a particular act at a time designated, of which specific performance may be enforced by the promisee (i).

It was contended in one case, in which the terms of the contract limited the mortgage to two years and declared that if the mortgagors failed to pay the mortgage amount within that period the mortgagee should be at liberty to recover the mortgage amount in any way he pleased, that the mortgage contract did not confer such a mortgage right on the mortgagee as would entitle him to realize the amount under it from the property. The Court, *Spankie, J.* dissenting, rejected this contention and held that the term of two years was named only with reference to the period within which the mortgagor was bound to satisfy the debt, and before the expiry of which the mortgagee could not demand payment, and that the mortgagee was in consequence entitled to recover by sale of the mortgaged property (j).

From badly drawn instruments it is often difficult to discover what the exact nature of the transaction has been. This obscurity ought to be avoided, as the whole position of the parties may depend upon the class to which the

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(i) *Badri Prasad v. Daulat Ram*, I. L. R. 3 All. 706.

(j) *Phul Kuar v. Murli Dhar*, I. L. R. 2 All. 527.

mortgage belongs (*k*). The Agra Sudder Court once held that when a deed is so loosely worded as to admit of more than one interpretation, the Courts will construe it in the sense most favourable to the mortgagor (*l*). But it has also been decided that if a deed is ambiguous as to the property conveyed, it will be read most strongly against the mortgagor, the conveying party (*m*). Where the construction to be put upon the contract is doubtful, the conduct of the parties may be looked to as shewing in what manner they understood the terms of the agreement (*n*).

In mortgages of an usufructuary nature, it should be stated clearly whether the profits are to be taken in lieu of interest only, or whether they are in lieu of both principal and interest: because in the latter case the pledger is not personally liable (except under particular circumstances,) and the mortgagee must look to the land alone for payment of his debt and the interest thereon (*o*). The personal liability of the mortgagor in a usufructuary mortgage depends wholly on the terms of the contract (*p*). If the intention was to charge the land with the interest alone, the mortgagee has only the personal security of the mortgagor for the principal (*q*).

A plaintiff objected to the allowance of interest at a rate in excess of the usufruct, and the Court held the objection

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(*k*) *Kirparam v. Mouzuma Bebee*, S.D.A. N.W.P. 1853 p. 356; *Ramrutton v. Gholam Jafur Khan*, S.D.A. N.W.P. 1853 p. 370; *Lyons v. Skinner*, S.D.A. N.W.P. 1853 p. 447.

(*l*) *Luljoo v. Gungoo*, S.D.A. N.W.P. 1850 p. 113.

(*m*) *Shaikh Sooltan Ali v. Syud Aftakur Hossein*, 18 W. R. 63.

(*n*) *Shunker Lall v. Poorun Mull*, 2 N.W.P. (Agra), H. C. 150.

(*o*) *Pohpee v. Cheda Lall*, S.D.A. N.W.P. 1848 p. 211; *Behari Lal v. Mussumaut Phekoo*, 1 Sel. Rep. 119. See also *Baboo Koonwur Singh Bahadoor v. Doollun Umrith Koonwur*, S.D.A. 1857, p. 1232; *Mussamat Mujeedumissa v. Syud Dildar Hossein*, 20 W. R. 178.

(*p*) *Munoo Lal v. Baboo Reet Bhoobun Singh*, 6 W. R. 283.

(*q*) *Nundloll v. Mussumut Kullianabuttee*, Marsh. 209.

to be good, saying : " When it is manifest that the usufruct does not amount to simple interest at a legal rate, and there is no rate of interest stipulated for, the presumption is that the usufruct was deemed by the mortgagee sufficient interest for his money debt, and that the mortgagor is not bound to pay a further sum to make up any particular rate ; the law is satisfied if no more than legal interest is received, and the Court has nothing to do with the accounts if less than that amount has been taken. In the present case, as no rate of interest was stipulated for, and the usufruct does not exceed a legal rate, the mortgagee must be considered as having agreed to take that and rest satisfied with the security the land afforded for regular payment. We therefore modify the Judge's decree, by declaring plaintiff entitled to recover possession when able to pay up the amount of the principal of his debt, defendant retaining the land as security for interest till such debt is paid" (r).

The parties may make any conditions or covenants they please, so long as these are not in themselves illegal (s), as—that the mortgagee in possession shall pay the mortgagor a certain allowance or rent (t) : that the loan shall be repaid by instalments, and that in default of payment of any one instalment, the mortgagee shall be entitled to foreclose for the balance then due (u) : that no payment made by the debtor shall be allowed, unless it is duly endorsed on the deed (although the Courts will, notwithstanding such a condition, admit proof of payment of a sum not so endorsed) (v) : that after payment of Government revenue and village

(r) *Mohree Bebee v. Nuzeer Mohummud*, S. D. A. 1860, vol. 2, p. 223.

(s) *Shunker Singh v. Chowdhuree Kurreem Yar*, S. D. A. N. W. P. 1852, p. 307.

(t) *Roy Juswunt Lall v. Sreekishen Lall*, S. D. A. 1852, p. 577.

(u) *Punnee Lall v. Indurjeet*, S. D. A. N. W. P. 1852, p. 322.

(v) *Tarakant Bhuttacharjea v. Bissonath Aubustee*, S. D. A. 1853, p. 544 ; *Kalee Doss Mittra v. Tara Chand Roy*, 8 W. R. 316 ; *Narayan Unkir Patil v. Motilal Ramdas*, I. L. R. 1 Bom. 45.

expenses, the mortgagor shall pay to the mortgagee the entire surplus collections and also all that may be derived from alluvion, and that if in the month of Jeyt in any year the whole surplus is not paid to the mortgagee, he shall be entitled to enter into possession (w): that if any ground shall be lost from the encroachment of a river bordering on the estate, the mortgagor shall make good the loss, and if anything is gained from the same river, the mortgagee shall make an allowance for it (x): that a third party named, as well as the mortgagor, shall have the right of redeeming (y): that the mortgagor shall make good the balances of rent unpaid by cultivators (z): that the mortgagor shall not alienate or mortgage his interest until the debt is paid off with interest (a): that the mortgagor not retaining possession, shall pay the Government revenue,—and any other such agreements.

But where the vendee of certain property declared in an instrument, by which he empowered the vendors to repurchase the property within a certain term, that “the whole sale consideration, or a portion thereof paid by any of the vendors on account of his own share, if paid from their own pockets, without transferring the property sold in any way, shall be received by me; but if it is paid or deposited in

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(w) *Baboo Newul Kishore Singh v. Thakoor Bhoojhawun Singh*, S.D.A. N.W.P. 1853, p. 70.

(x) *Baboo Koonwur Singh v. Gosain Bhunjun Geer*, S.D.A. 1852, p. 928; see also *Sadashiv Anant v. Vithal Anant*, 11 Bom. H. C. 32.

(y) *Ramsurrun Singh v. Mussumat Soobutchna*, S.D.A. N.W.P. 1848, p. 187.

(z) *Moolchund v. Mussumat Deekoower*, S.D.A. N.W.P. 1852, p. 477 (cf. p. 482); *Baboo Newul Kishore Singh v. Thakoor Bhoojhawun Singh*, S.D.A. N.W.P. 1853, p. 70.

(a) *Heera Lall v. Rutchpal*, S.D.A. N.W.P. 1851, p. 39; *Mithoo Bebee v. Baboo Madho Pershaud*, S.D.A. N.W.P. 1852, p. 614; et passim.



Court, being raised by transfer of the property sold, it shall not be received by me, nor shall the sale made by the vendors in my favour be considered cancelled," a Full Bench of the Allahabad High Court held this condition to be most inequitable and incapable of enforcement, either against the original vendors or their representatives in title (*b*).

The property intended to be mortgaged should be described so that it may be readily recognised and identified, and so as to meet the requirements of the Registration Act (*c*). In a case before the Bombay Courts, it appeared that in the document by which a certain village was mortgaged its boundaries were not given, it being described merely by name. Subsequently by reason of some proceedings of the survey officers the size of the village was much increased. It was held that the mortgagee was under the circumstances entitled to the benefit of this increase (*d*).

In another case which came before the Allahabad High Court the facts were that certain lands, which had been gained by alluvion, and had been formed into a separate mahal, and assessed with revenue at Rs. 88, appertained to a certain taluka and mahal called *B*, which had been assessed with revenue, apart from the alluvial mahal, at Rs. 6,800-4-7. The owners of taluka *B* mortgaged that taluka by a deed in which they described the property mortgaged as the whole of the mouzas original and appended, yielding a jama of Rs. 6,800-4-7, along with all original and appended rights, water and forest produce, high and low lands, cultivated and uncultivated lands, etc., etc., and all and every portion of our proprietary, possessory and demandable rights, without excepting any right or interest obtained or obtainable, etc." Subsequently the mahal taluka *B*, "together

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(*b*) *Ram Saran Lal v. Amirta Kuar*, I L. R. 3 All. 369 (cf. p. 378).

(*c*) Act III of 1877, s.s. 21, 22.

(*d*) *Sadashiv Anant v. Vithal Anant*, 11 Bom. H. C. 32.

with original and attached mahal and all the zamindari rights appertaining thereto," was sold in the execution of a decree enforcing the mortgage. The auction-purchaser subsequently contracted to sell the "entire taluka B, jama Rs. 6,800-4-7," but afterwards refused to perform the contract and was sued for its specific performance. In the plaint, and in the decree for the specific performance of the contract which the purchasers obtained, the property was described in the same terms as in the contract of sale. In a suit by the purchasers for the possession of the property, it was held that the terms of the mortgage were sufficiently comprehensive to include the alluvial mahal in the property mortgaged, and that it was not intended by the entry of the jama of taluka B, exclusive of that of the alluvial mahal, to exclude the latter from the mortgage, the entry being merely descriptive. Also that the alluvial mahal passed to the purchaser at the auction sale under the words "attached mahal," and further that the sale to the plaintiffs passed the alluvial mahal, the words "the entire taluka B" being sufficient to include it, the entry of the jama of mahal B in the contract of sale, plaint, and decree being, as in the mortgage, merely descriptive (e).

It seems that words used in a future sense, such as "and whatever property I may hereafter acquire," or words which are general and do not refer to any specific property, will not give any lien to the mortgagee, as against an intermediate *bonâ fide* purchaser. Where there was a mortgage of certain villages named, and in the concluding part of the deed, authority was given to the mortgagee, on default of payment by the mortgagor, to sell the villages pledged, as well as "any other existing property and whatever may hereafter be acquired," a village acquired by the mortgagor after the execution of the deed, was held not to be included

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(e) *Ganpatji v. Saadat Ali*, I. L. R. 2 All. 787.

in the mortgage so as to defeat the claim of a purchaser at public auction in execution of a decree. The Court said that independently of the fact that the mortgagor was not possessed of the village at the date of the deed, the words were to be treated as mere surplusage, because without them all his property was equally liable to make good the mortgagee's claim should the pledged estate prove insufficient (f). In another case it was decided that an agreement by a debtor to discharge a debt by instalments and "not to alienate any part of his property,"—the property not being specified,—“until the debt had been paid,” did not operate as a mortgage, or vitiate the title of a *bonâ fide* purchaser from the debtor. But it was declared to be doubtful whether, after the debtor has committed a breach of his agreement, “the creditor is any longer bound to act on the forbearance stipulated for by the *kistbundee*, and may not at once demand payment in full of the debt due to him” (g).

So also where a mortgagor promised to repay the moneys advanced and declared that “till payment of the amount I will not transfer any property by conditional sale or mortgage” it was held that, inasmuch as no specific property was referred to, as also because there was nothing to shew that the parties intended that any property should be pledged, the transaction did not amount to a mortgage (h). And where certain persons describing themselves as residents of a certain place gave a bond for the payment of money in which, as collateral security, they charged “their property” with such payment, the Court observed (though

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(f) *Mullick Bachoo v. Goorbuksh Gir*, S.D.A. N.W.P. 1852, p. 265.

(g) *Chunderkishore Surma Roy v. Goorchurn Sha*, S.D.A. 1855, p. 353. See also *Rajkumar Ramgopal Narayan Sing v. Ram Dutt Chowdhry*, 5 B. L. R. 264 (F.B.)

(h) *Gunoo Singh v. Latafut Hossain*, I. L. R. 3 Calc. 336. See also *Najibulla Mulla v. Nusir Mistri*, I. L. R. 7 Calc. 196.

the decision of the case did not turn on this point) that the bond-debtors did not thereby create a charge on their immoveable property situated in the place referred to (i).

But where a person to whom the Government had made a grant of certain villages, executed an instrument in favour of his brother charging the payment of an annual allowance to him and his heirs for ever on the "granted villages," it was held that, inasmuch as there was no doubt as to the particular villages granted by the Government, the fact that the instrument did not name the villages which had been granted did not constitute such an ambiguity in the instrument as to render the charge created thereby invalid (j).

In the case of mofussil mortgages entered into before the 1st of July 1882, as also in the case of such mortgages entered into after that date in places to which the Transfer of Property Act 1882 does not at present extend (k), the question of the validity of a power of sale in a mortgage deed,—an authority to the mortgagee, on default being made by the mortgagor, to sell the mortgaged property and so repay himself without applying to the Court,—is one concerning which there appears to be some conflict.

In the Bengal Presidency there is authority both against and in favor of the validity of such a power. A mortgage deed gave the mortgagee a power of sale over the estate, in case default should be made in payment of the mortgage money on a day named: the mortgagee sold under the power: and the purchaser brought a suit against the mortgagor to obtain possession of the land sold to him. The Court refused to recognise the validity of such a power,

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(i) *Deojit v. Pitambar*, I. L. R. 1 All. 275. See also *Bheri Dorayya v. Maddipatu Ramayya*, I. L. R. 3 Mad. 35.

(j) *Kanhia Lal v. Muhammad Husain Khan*, I. L. R. 5 All. 11.

(k) i.e., the Presidency of Bombay, the Panjab and B. Burma, (see sec. 1 of the Act)—For the law under the Act see sec. 69 of the Act.

or to give any assistance in carrying it into effect saying (l), "Such a condition might be perfectly consistent with the laws of a great commercial country affording every facility to the capitalist lender, but, at the same time, be quite inconsistent with the laws of a country deriving the great bulk of its revenue from the land, and as a recompense for the stringency of the rules under which it is compelled to collect its revenue in order to carry on the Government (sale of the estate being the penalty of default), affording every possible protection, in his private transactions, to the landholding borrower. The Regulations will be searched in vain for any express enactment prohibiting the sale of a mortgaged estate under a power of sale. But such a power is repugnant to the principles of the Regulations enacted by Government for regulating the transfer of immoveable property in satisfaction of debt in general, and in satisfaction of debts on mortgage in particular. The Regulations do not sanction, in any case, the transfer of immoveable property in satisfaction of a debt, without the intervention of a public officer, except such transfer be by the direct and immediate act of the proprietor himself."

But in the unreported case of *Sunatun Bysack v. Koonjo Biharee Bysack* (n), the Court (*Bayley* and *Hobhouse*, JJ.) expressly dissented from the decision in *Bhuwanee Churn Mitr v. Jykishen Mitr* (n). In that case it was provided by the terms of the mortgage deed that the sums due under the mortgage should "be recoverable by a separate suit in respect thereof or by sale of a portion of the mortgaged premises, sufficient to realize the amount so due;" and the Court held, in a suit by the mortgagees to

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(l) *Bhuwanee Churn Mitr v. Jykishen Mitr*, S.D.A. 1847, p. 354.

(m) See the Tagore Law Lectures, 1876, Appendix I, where the judgment in this case is printed at length.

(n) S.D.A. 1847, p. 354.

recover from the mortgagor certain sums due under the mortgage by attachment and sale of the mortgaged premises, that, by the agreement between the parties, the plaintiffs were not bound to realize their monies by the sale of the properties mortgaged, but they had the option either of so realizing the monies or else of proceeding against the defendant by a suit to recover the same; but inasmuch, as the plaintiffs had elected the option which put the other party, who did not oppose the realization of the money due by private sale of the mortgaged property, to the trouble and expense of coming into Court, although the plaintiffs were entitled to a decree, the case was not one where, in a proper exercise of its discretion, the Court ought to award them costs.

With regard to the case of *Bhuvanee Churn Mitr v. Jy-kishen Mitr* (o) *Bayley, J.*, observed: "Of course the decision cited is clear in its terms, but it is one passed about two and twenty years ago (p), and it is not shown to us that it has been followed by a single case after its date (q). But be that as it may, it seems to me quite clear that under the general law of contract, when parties agree to alternative remedies to be available to the creditor under their contract, it would be perfectly inequitable in a Court of justice, equity and good conscience to refuse to carry out the terms of the contract unless it is shown that those terms involve direct illegality or immorality. But nothing of this kind is shown or attempted to be shown in this case." *Hobhouse, J.*, also expressed a like opinion saying: "I quite agree with Mr. Justice *Bayley*, that the decision of the *Sudder Dewany Adawlut*

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(o) S.D.A. 1847, p. 354.

(p) Judgment in the case of *Sunatun Bysack v. Koonjo Biharee Bysack*, was delivered on 23rd September 1869.

(q) See however the remarks of *Peacock, C.J.*, in *Doucett v. Wise*, 2 Ind. Jur. 280 (cf. p. 292).

of 1847 at page 354 ought not to bind us; that decision is to the effect that, where a mortgagee was entitled under the contract between him and the mortgagor to sell the property mortgaged if the debts were not paid, then when the mortgagee did sell the property and the vendee claimed possession after the sale, he could not obtain possession because of that policy declared by the laws of this country which made such a sale altogether inoperative. Now it seems to me that if it were the intention of the Legislature in any instance to prevent contracts between private parties being binding in all their particulars, the Legislature would specially have said so, and would have assigned its reasons; and in furtherance of this view I find from the very decision relied upon that wherever the Legislature interfered in contracts between parties, it has done so by special legislation, and for special reasons assigned; for instance Regulation XVII of 1806, which was between the mortgagor and the mortgagee, requires foreclosure proceedings to be carried out through the Court. It seems to me that there is nothing in any proceeding of the Legislature which evinces any desire to interfere in matters of private contracts between parties except in special cases and for special reasons assigned....I am of opinion therefore that the plaintiffs could, under the terms of their agreement, have sold the estates mortgaged without resorting to the Court."

In a more recent case both the above decisions were referred to, and the Court (*L. Jackson and McDonell, JJ.*) said that if they were called upon to determine the point, they should have felt considerable difficulty. As it was they disposed of the case on another ground (*r*).

In the Presidency of Bombay also the decisions on this point do not appear to be entirely unanimous, though the

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(*r*) *Bhanoomutty Chowdhraim v. Premchand Neogee*, 15 B. L. R. 28 (cf. p. 31).



leaning of the Courts is no doubt in favour of the validity of such a power.

Where the Subordinate Judge had given the plaintiff a decree for sale of the mortgaged property, but had laid all the costs of the suit on him, on the ground that the mortgaged deed gave him a power of sale, and that it was therefore unnecessary for him to come into Court until he had exercised that power, and found it insufficient for the purpose of recovering the full amount of the debt, the plaintiff appealed to the High Court against the order as to costs. The Division Bench (*Melvill* and *Kemball*, JJ.,) held that the plaintiff was entitled to his costs (*s*).

*Melvill*, J., based his decision on the ground that it was extremely doubtful whether the plaintiff could have made a valid sale under the power contained in the mortgage deed: that he would have been very ill advised if he had attempted to exercise a power so novel and of such doubtful validity, and that even if it were not absolutely necessary for him to come into Court, he showed a proper and wise discretion in so doing. In his judgment the learned Judge discussed and expressed his approval of the decision of the Bengal Sudder Adawlat in *Bhuwanee Churn Mitr* v. *Jykishen Mitr* (*t*), and, while admitting that the sale of a pledge by a creditor did not appear to be opposed to the Hindu law, declared that the usage of the country, which, as a guide to the Courts, should take precedence of the Hindu law, was opposed to the exercise by a creditor of such a power as was conferred by a power of sale.

On the other hand, *Kemball*, J., distinctly dissented from the ruling of *Melvill*, J., that it was a matter of great doubt whether the plaintiff could have made a valid sale

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(*s*) *Keshavray Krishna Joshi* v. *Bhavanji bin Babaji*, 8 Bom. H. C. (a. c. j.) 142.

(*t*) S.D.A. 1847, p. 354.

under the power given him by his deed. He held that the plaintiff was entitled to his costs, on the ground that a power of sale was only an additional remedy given to the mortgagee, and that it did not interfere with his right to bring his action, inasmuch as a Court of Equity will not prevent a mortgagee from using all the remedies belonging to his character, and exercising all the powers that are given to him, as and when he pleases, even concurrently. With regard to the validity of a power of sale, the learned Judge said (u) : " But assuming, for the sake of argument, that the only remedy left to the plaintiff under the terms of the mortgage was to sell the property on which his debt was secured, I must confess I see no objection, the ruling of the Bengal Sadr Court notwithstanding, to the exercise of such remedy. The introduction of a power of sale into mortgage deeds in the mofussil is, no doubt, to say the least, *unusual*, but I do not understand why on that account it should not be exercised ; nor am I aware, whatever may be the law in Bengal, that the exercise of such a power is in any way repugnant to either the letter or spirit of our Regulations, it being borne in mind that prior to the ruling in *Ramji v. Chinto* (v) it had been invariably held in this Presidency, where there was an agreement that the right of redemption should be confined to a particular time, that on default made the property in the thing mortgaged passed absolutely. Moreover, I do not understand why the Courts should interfere with arrangements fairly entered into between individuals for the purpose of avoiding expense and delay, merely because some possible injustice is dreaded. My own experience teaches me that the professional money-lenders neither desire nor seek to possess themselves of land,

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(u) *Keshavrav Krishna Joshi v. Bhavanji bin Babaji*, 8 Bom. H. C. (a. c. j.) 142 (cf. p. 149).

(v) 1 Bom. H. C. 199.

and where cases of oppression and fraud do arise the Courts are open to those aggrieved."

In the case of *Pitamber Narayendas v. Vanmali Shamji* (*w*) a Division Bench, consisting of *Westropp*, C.J., and *Kemball*, J., held that where due notice had been given to the mortgagor of the mortgagee's intention to sell, and the sale had been fairly conducted, a sale, without the intervention of a Court of Justice, of mortgaged lands situate in the mofussil of Bombay under a power of sale contained in an indenture in the ordinary English form was valid. Though the learned Chief Justice, who delivered the judgment of the Court, no doubt declared that the Court was unable to find either enactment or decision which invalidated such a power it seems doubtful whether the decision can be looked upon as authoritatively deciding the general proposition that a sale under a power contained in a mortgage of lands in the Bombay mofussil is valid. The Court appeared to rest its decision on the narrower ground that the form of the mortgage contract before it was such as to indicate that the parties intended to contract with reference to the English law. On this point the judgment was as follows (*x*): "In the present case *Pitamberdas*, the mortgagor, must have known perfectly well that, dealing as he was with an English Company, which had an established form for the deeds of mortgage required by it for persons borrowing money from it, he could not have obtained the loan which was made to him without giving such a power of sale as is contained in the mortgage of the 25th October 1871. In *Bholanath Coondoo Chowdry v. Unodapersad Roy* (*y*), which is not in other respects in point in this case, *Colvill*, J., said: 'The defendants have taken on land, in

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(*w*) I. L. R. 2 Bom. 1.

(*x*) *Ibid.* p. 7.

(*y*) 1 Boulnois 97 (cf. p. 101.)

the mofussil a mortgage in the English form, the inference, therefore, is strong that they intended to contract with reference to the English law, and to enforce their rights according to that law.' Similar remarks have often been made in cases where the parties (not English) have thought proper to adopt the English form of contracting. That such was the intention of the parties, where the mortgagees are an English Joint Stock Company, having their chief office in London, would seem to be *à fortiori*. We fully believe that to have been the understanding of the mortgagor Pitamberdas at the time of the execution of the mortgage. Sales, under such a power as we have here, have always, when not open to special objection, been upheld in the Island of Bombay; and unless we find the law to be otherwise in the Bombay mofussil, we see no sufficient reason for imposing upon parties contracting with respect to land situated there, a disability which does not exist in the Island. We are unable to find either enactment or decision which invalidates a sale under such a power in a mortgage affecting lands in the Bombay mofussil."

And in the later case of *Jagjivan Nanabhai v. Shridhar Balkrishna Nagarkar* (z), Melvill, J., while deciding in favour of the validity of such a power, expressly declared that this was on the ground that the parties must be held to have intended to contract with reference to English law. He said: "In *Keshavray v. Bhavanji* (a) I have expressed a doubt whether in the case of an ordinary mortgage in the mofussal, the mortgagee can exercise a power of sale given by the instrument of mortgage. In the present case, although the mortgage property is situated a few miles out of Bombay, the parties are residents of Bombay, conducting their transactions through Bombay solicitors and the instru-

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(z) I. L. R. 2 Bom. 252.

(a) 8 Bom. H. C. (a. c. j.) 142.

ment of mortgage is a regular and formal deed in English form. I think that in this case the parties must be held to have intended to contract with reference to English law, and to be entitled to enforce their rights according to that law; *Bholanath Coondoo Chowdry v. Unodapersad Roy*' (b).

It would appear therefore to be questionable whether the rule laid down by the Supreme Court in *Bhurwanee Churn Mitr v. Jykishen Mitr* (c) would now be followed. It may be doubted whether the dread of injustice to the mortgagor, which was the foundation of that rule, is sufficient to outweigh the manifest convenience and advantage to both parties, which arise from a sale unaccompanied by the expense and delay by which litigation is at all times attended. Moreover, except where there are strong reasons for it, interference with arrangements fairly made between individuals is undesirable. There is nothing *prima facie* inequitable in such a power: and if in fact any great oppression is worked by the mortgagee, or the land is sold for an evidently unfair price, the mortgagor still has his remedy through the Courts.

In England also, it was once doubted whether such powers should be upheld, and for a time the inclination and the decisions of the Courts were against them. But for a very long period they have been uniformly supported and given effect to. A power of sale on default is given to the mortgagee in almost every English mortgage deed: and such powers are constantly acted upon, without any general complaint being heard of the evil effects produced thereby. On the contrary, they are found in practice to be very useful, and to be the means of avoiding much expense and delay: while in the event of any abuse of the privilege they confer, the mortgagor has no difficulty in obtaining relief from the Courts. The observations of a well-known

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(b) 1 Boulnois 97 (cf. p. 101.)

(c) S. D. A. 1847, 354.

writer on the subject of English mortgages are very much to the point (d): "Doubts were formerly entertained of the validity of an exercise of these powers of sale, without the concurrence of the mortgagor, or the sanction of a Court of equity, but they were groundless: a slight consideration will show that they are not within any of the mischiefs intended to be guarded against by the Courts of equity, for they give nothing to the creditor beyond his principal, interest, and costs: they bestow on him no collateral or ulterior advantage; and they only enable him with promptitude to obtain payment of his mortgage debt."

So universal has the use of these powers become under the English law, that now even if no power of sale be expressly given by the mortgage deed, the mortgagee has a statutory power of sale. This was first conferred by Stat. 23 and 24 Vic. c. 145 (e) which declared that unless the power were negatived by express declaration in the security, and subject to any variations or limitations contained in it, mortgaged real and leasehold estates might be sold by the mortgagee in the manner and under circumstances similar to those under which an ordinary power of sale vested in the mortgagee by the mortgage deed might be exercised. And to a similar effect are the provisions of Act XXVIII of 1866 (f): but this Act extends only to mortgages to which English law is applicable (g).

Since the passing of Act XXVIII of 1855 (for the repeal of the usury laws) (h), interest may be contracted for at

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(d) Coote, 3rd Ed., p. 124. The passage quoted above has not been reproduced *verbatim* in the present (the 4th) edition of the work.

(e) Secs. 11—16 and sec. 32. See Fisher's Law of Mortgage, 3rd Ed., p. 498, and Coote, 4th Ed., p. 259. The provisions of secs. 11—16 of 23 and 24 Vic. c. 145 have been repealed by 44 and 45 Vic. c. 41, which however contains like provisions. See secs. 19—22.

(f) Sec. 6.

(g) Sec. 45. See also the Transfer of Property Act (Act IV of 1882) sec. 69, last para.

(h) This Act came into force on the 19th of September 1855.

any rate on which the parties choose to agree. But no agreement to pay interest at a rate higher than twelve per cent. per annum can be enforced if it was entered into prior to that Act: such an agreement cannot be enforced as regards interest, even to the extent of the legal interest: while, if the attempt to secure more than twelve per cent. has been made in such a manner as the Court considers to be "elusive" of the law, a suit brought on the contract will be dismissed with costs, and neither principal nor interest can be recovered.

The second and third sections of Regulation XV of 1793 (i) provide for the rates of interest to be decreed where the cause of action arose before the 28th of March 1780, and where it arose between that date and the 1st of January 1793. Section 4 enacts that where the cause of action arose on or after the latter date, the Courts are not to decree any interest above the rate of twelve per cent. per annum: and section 5, that if in any of the cases specified in the preceding sections, a lower rate of interest than any of the rates therein authorised to be awarded shall have been stipulated between the parties, no higher rate of interest than the rate so stipulated is to be decreed. Sections 6 and 7 provide that accumulated interest in excess of the principal shall not be allowed, nor compound interest, except in the cases specified. By section 8 it is enacted that "the Courts are not

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(i) Extended to the N.W.P. by Ben. Regs. XXXIV of 1803 and XVII of 1806. For the corresponding law in Madras, see Mad. Reg. XXXIV of 1802, as modified by Mad. Reg. II of 1825, sec. 7, and *Perlathail Subba Rau v. Mankude Narayana*, I. L. R., 4 Mad. 113. In Bombay the corresponding law was contained in Bombay Reg. I of 1814, but this Reg. was repealed by Bombay Reg. I of 1827, in which year it was enacted by Bom Reg. V of 1827, ss. 10—12 (afterwards repealed by Act XXVIII of 1855) that the lawful rate of interest was such rate as was agreed upon between the parties or as was demandable by usage.



to decree any interest whatever, in any case where the bond or instrument given for the security and evidence of the debt, shall have been granted on or subsequent to the 28th of March 1780, and shall specify a higher rate of interest than is authorized by this Regulation to have been given and received subsequent to that date;" and section 9 adds, "nor to decree any interest whatsoever in favor of the plaintiff, in any case when the cause of action shall have arisen on or subsequent to the 28th of March 1780, when a greater interest than is authorised by this Regulation shall have been received or stipulated to be received, if it be proved that any attempt has been made to elude the rules prescribed in it, by any deduction from the loan, or by any device or means whatever, nor to give any other judgment but for dismissal of the suit, with costs to be paid by the plaintiff." The 10th section of the Regulation provides that in all mortgages made on or after the 28th of March 1780, whether usufructuary or not, the mortgagee shall not be entitled to recover more than twelve per cent. altogether: and that all such mortgages are to be considered as virtually and in effect cancelled and redeemed wherever the principal with the simple interest upon it (not exceeding twelve per cent.) have been realized from the usufruct or otherwise liquidated by the mortgagor.

In the case of *Shah Mukhun Lall v. Baboo Sree Kishen Sing (j)* which was before the Privy Council in 1868, those sections were much discussed. The suit was brought for a declaration that three several instruments together formed one mortgage transaction: to establish the plaintiffs' right to redeem: to cancel the instruments: and to obtain possession of the lands and payment of a small estimated surplus. In the course of the suit the further questions were raised—at what rate of interest, whether at nine per cent. (the

rate fixed by the mortgage deed, one of the three instruments which, as the Court held, formed one transaction) or at a higher rate (provided by all the deeds read as one), the plaintiffs were entitled to redeem: whether the loan was at usurious interest: and whether the several instruments were a device or means within sec. 9 of Reg. XV of 1793 to conceal usury and to evade the law. The Sudder Court held (k) that the three instruments formed one mortgage security, and were a device to conceal usury: that the contract was usurious: but that, as the plaint was for redemption, the mortgage was redeemable on payment of the principal and nine per cent., the interest expressed to be payable in the mortgage deed. The Privy Council, while agreeing that the several transactions formed one mortgage and were a device to evade the usury laws within the meaning of section 9, inasmuch as though the only rate of interest expressed in the actual mortgage deed was nine per cent., the general result of the several transactions was to give the mortgagee fourteen per cent., were of opinion that the mortgagor, if allowed to redeem, must be charged with interest at twelve per cent. They held that though the mortgagee, if he had come into Court as plaintiff could not have enforced his claim,—still the mortgagor, as he sued to redeem stating what the real terms of the agreement were, could not both “approve and reprobate” the transaction. “The present suit is one for redemption, not for declaring a forfeiture, and must be decided according to the rules applicable to the former suit. If the transaction were simply void and no estate at all passed, it is obvious that the remedy to recover the land would be a possessory suit against which limitation would run from the moment of entry. It cannot be treated as a voidable or redeemable estate between mortgagor and mortgagee for one purpose, viz. to escape the limitation

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(k) *Juggutputty Singh v. Rughoobur Dyal*, S.D.A. 1852, p. 678.

law, and as a void estate for another. If the estate in the lands created by the lease can be determined before the expiration of the twenty years, that can only be effected by coming to the Court for equitable relief and submitting to the usual terms in which such relief is granted. What then are those terms? The Court will not, in the interests of justice, permit inconsistency and untruth of statement,—will not permit a plaintiff to say ‘I promised to give the defendant fourteen per cent. on his loan to me,’ and seek relief on that allegation: and permit him also the next instant to say, ‘The contract is expressed for nine per cent. and I will tie my opponent down to that term: this lower rate must be deemed to have been stipulated and so to form the measure of his right to interest.’ The reply to this will be: ‘You have told us what the real bargain was, and on this statement have made your application for relief, which you can obtain only on equitable grounds. Their Lordships find in the Regulations no positive law, forbidding the application of these principles of justice to the case. The 10th section rather leads to the contrary conclusion, viz., that in a case circumstanced like the present, the mortgagee may retain his pledge until he has received out of it his debt with interest at twelve per cent.’ (l).

Where, however, the mortgagee comes into Court to enforce a claim based on an agreement falling within the terms of section 9, his suit will be dismissed. Thus in the case of *Wise v. Juggobundhoo Bose* (m) the Privy Council held that a certain bond, a lease, and an under-lease formed one entire transaction which was usurious and elusive, and fell under section 9 of Reg. XV of 1793: and the suit to enforce the bond was consequently dismissed. Their Lord-

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(l) *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 12 Moore's I. A. 157, (cf. p. 185, *et seq.*)

(m) 12 Moore's I. A. 477 (cf. p. 494). See also *Wise v. Kishenkoomar Bous*, 4 Moore's I. A. 201 (cf. p. 219).

ships say : "Then there comes (in section 9) this 'is not to give any other judgment but for the dismissal of the suit'; and we cannot conceive that that means anything but the dismissal of the suit so far as it has relation to that usurious contract, though of course it would be different if there was one count on one transaction and another count upon another and a totally different transaction."

In a case of *bye-bil-wufa*, the mortgagee having exacted illegal interest by deduction from the principal, his suit to have the sale made absolute was dismissed with costs, under section 9 (n). So, where there was a mortgage by conditional sale on an actual advance, and at the same time the mortgagor transferred absolutely to the mortgagee certain other land, without any consideration, but under pretence of the transfer being in payment of charges for preparing deeds, &c. (o).

A deed in which sums, which had not then been paid, were stated to have been received, and an engagement was entered into to pay interest on them from the date of the deed, that is, for a time before payment of them, was held to be usurious and "elusive," and a suit founded on it was dismissed with costs (p).

In a suit to obtain possession of certain premises, under a deed of *bye-bil-wufa*, where the mortgage had been foreclosed and the sale had become absolute,—it appearing that twelve per cent. per annum was the rate of interest stipulated for in the deed, and that the mortgagor had granted a separate bond in which he undertook to pay one per cent.

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(n) *Sayud Athar Ali v. Rai Nawazi Lal*, 5 Sel. Rep. 8; *Sri Nath Mallik v. Abhai Charan Nandi*, 5 Sel. Rep. 79.

(o) *Parasnath Chaudhuri v. Lala Bihari Lal*, 5 Sel. Rep. 346.

(p) *Baboo Gungapersaud Singh v. Sheikh Gholam Hossein*, S.D.A. 1852, p. 516. See also *Ununtram v. Meer Mahomed Bakur*, S.D.A. 1853, p. 268.

additional,—the transaction was held to be elusive of the law, and the suit was dismissed with costs (q).

It is not a fair interpretation of section 9 of Regulation XV of 1793 to bring within its terms every contract, the ultimate effect of which is to secure to the lender more than the legal interest of twelve per cent. upon money lent by him. A contract is not within the terms of that law, whatever its ultimate effect may be, provided it be on the face of it a fair and open transaction, and one in which the borrower takes the chances of the market price of an article at a particular period (r).

Lands were sold on payment of Rs. 4,401, the vendee covenanting by a separate deed not to take possession until the lapse of a year and four months, at the end of which time the vendor might re-purchase on paying Rs. 5,801, —otherwise the sale to be absolute. The vendor did not repurchase, and the lender sued for possession as on an absolute purchase. But the transaction was held to be a *bye-bil-wufa* with a stipulation for the payment of illegal interest, and to be evasive of the law. Under the special circumstances of the case, however, the principal was not declared forfeited, but only the interest (s).

It must be clear that there was a design to evade the law: otherwise the penalty of dismissal with costs (involv-

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(q) *Luchmun Pooree v. Jowahir Geer*, 4 Sel. Rep. 106; *Mooftee Mohamed Ishaq v. Jehangeer Beg*, S.D.A. N.W.P. 1853, p. 411.

(r) *Etbaree Chowdree v. Sheikh Furzund Alee*, S.D.A. 1857, p. 183. See also *Tarachunder Pal v. Khonaram Dass*, S.D.A. 1857, p. 118; *Sheikh Munsoor Alee v. Ahoo Talub*, S.D.A. 1857, p. 189; *Musst. Afeefa Bewa v. Omrao*, S.D.A. 1858, p. 457; *Jew Ramkulita v. Sunbaro Rajbunsee*, S.D.A. 1858, p. 913; *Booha Gazee v. Ameer Khan*, S.D.A. 1858, p. 961. But see also *Keramut Hossein v. Muddunmohun Singh*, S.D.A. 1855, p. 452.

(s) *Moolhumud Jaun Chowdhry v. Ramruttun Das*, 2 Sel. Rep. 146.

ing the loss of the principal as well as the interest) cannot be imposed (t).

If in drawing up a bond payable by instalments, the interest accruing during the currency of the bond is provided for by adding a certain sum to the original debt and taking a bond for the whole sum, this is not an infraction of the usury laws, so long as the additional sum stipulated for as interest does not exceed the limit prescribed by law (u).

A mortgagee, who was a Mahomedan and wished to avoid the appearance of taking interest, actually advanced only Rs. 1,300. But consolidating the legal interest of that sum for five years (Rs. 781), the period during which the mortgage was made redeemable, he took a mortgage bond for the aggregate sum of Rs. 2,081. It was held that he was entitled to recover the sum actually advanced, with interest at the rate of twelve per cent. per annum, as there was no attempt or intention in fact to get more than legal interest (v).

In an agreement mortgaging land, the rents of which amounted to about Rs. 2,500, it was stipulated that out of these rents, the mortgagee should pay himself interest at ten per cent., with ten per cent. as expenses of collection, and should discharge certain public burdens, devoting the

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(t) *Mussumat Ranee Roop Koor v. Moonshee Sobharam*, S.D.A. N.W.P. 1855, p. 43; *Sheikh Muscent-oollah v. Hurgopal*, S.D.A. N.W.P. 1855, p. 276; *Khedoo Lal Khatri v. Rattan Khatri*, 5 Sel. Rep. 10; *Mookummud Jaun Chowdhry v. Ramruttun Das*, 2 Sel. Rep. 146; *Sheikh Uzhur Ali v. Sheo Patuk Lal*, S.D.A. 1847, p. 459; *Musst. Zuhoorun v. Musst. Bebee Minnutt*, S.D.A. 1852, p. 1132; *Petition No. 519 of 1853*, S.D.A. 1853, p. 893; *Bhebbur Singh Burrah v. Jeenaram Charal*, S.D.A. 1855, p. 336; *Savi v. Mohemachunder Bose*, S.D.A. 1857, p. 849.

(u) *Bheem Seyn v. Hursookha*, S.D.A. N.W.P. 1854, p. 487.

(v) *Syud Khadim Ullee v. Duljeet Singh*, 2 Sel. Rep. 255. See also *Roy Juvunt Lall v. Sree Kishen Lall*, S.D.A. 1852, p. 577.

surplus to the reduction of the principal; and that if the rents fell short of Rs. 2,500 a year, the mortgagors should make them up to that sum. This was held to be a good agreement, and not usurious; and the rents falling short of Rs. 2,500 a year, the mortgagees recovered the deficiency from the mortgagor (*w*).

Under the old law, a condition in a mortgage deed (the mortgage being of an usufructuary nature) that the mortgagor shall not demand a settlement of accounts when redeeming, will be disregarded, and the general rule as to the redemption of mortgages of the nature of the one in suit, will be acted upon (*x*). And in like manner, an agreement that the mortgagor shall have no right to claim an account of the proceeds of the estate during the occupancy of the mortgagee, cannot (and no similar special condition between the parties can) bar the operation of the law by which the lender "is to account to the borrower for the proceeds during his possession" (*y*).

In the case of *Hunoomanpersaud Panday v. Mussumat Baboo Munraj Koonwaree* (*z*) to which there has been occasion to refer so frequently, the mortgagee was put in possession under a lease at a fixed rent, and claimed not to be liable to account for the sums received by him; but the Privy Council ruled that the lease was merely part of the mortgage security and was intended to create not a distinct estate, but only a security for the mort-

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(*w*) *Baboo Sheosuhjee Lal v. Baboo Ubheelakh*, S.D.A. 1848, p. 872.

(*x*) *Shunker Singh v. Chowdhuree Kureem Yar*, S.D.A. N.W.P. 1852, p. 307.

(*y*) *Sheikh Bukshoo v. Bheekaree Khan*, S.D.A. 1851, p. 632; *Ram Dass v. Byroperashad*, S.D.A. N.W.P. 1850, p. 456; *Behari Lal v. Mussumaut Phekoo*, 1 Sel. Rep. 119.

(*z*) 6 Moore's I. A. 393. See also *Ruttun Munnee Surma v. Syud Bukht*, S.D.A. 1849, p. 134; *Baboo Koonwur Singh Bahadoor v. Doollun Umritk Koonwur*, S.D.A. 1857, p. 1232.



gage money. "As it was not meant that the principal should be risked, it was virtually a provision to exclude an account of the rents and profits, and the decree of the Sudder Dewanny Adawlut, directing an account of the actual rents and profits, therefore proceeds on the right principle and is in accordance with the true nature of the security and the spirit of the Regulations:"—and their Lordships added that, under the Regulations, unless the principal is meant to be risked, and is put in risk, the estate created as part of a mortgage security, whatever be its form or duration, can be received only as a security for the mortgage debt, and must be restored when the debt, interest, and costs are satisfied by receipts.

But there is nothing in the old law, which says expressly that the accounts must be filed whether they are required for the determination of the rights of the parties in the suit or not. This has been ruled by the Privy Council in a case which came from the N. W. P., where the law in force (Reg. XXXIV of 1803) differed in no material respect from that in force in Bengal (*a*). In a mortgage entered into in 1852 of *malikana* fixed for the period of settlement, it was agreed that the mortgagee should collect the village *jama*, pay the Government demand, and take the *malikana*, of which part was to be received by him as interest on the money lent at one per cent. per mensem, and the balance, *viz.*, Rs. 565 per annum, was to be retained by him as the costs of collection. No accounts were to be rendered of the *malikana* collected during the time of the mortgagee's possession. The Privy Council held that, if this agreement had been a contrivance for securing to the mortgagee a higher rate of interest than that to which he was then by law entitled, it would have been void under the usury laws (in force under Reg. XXXIV of 1803 until the passing

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(a) *Badri Prasad v. Murlidhar*, I. L. R. 2 All. 593 (P.C.).

of Act XXVIII of 1855), and would not have prevented the accounts from being taken. But as the lower Courts had found that the agreement was not in the nature of a contract for interest, that there was no evasion of the law thereby, or any contract to give usurious interest, and that the Rs. 565 per annum constituted a fair percentage, which it had been *bonâ fide* agreed should be allowed to the mortgagee for the cost of collection, there was no need for the accounts to be filed in order that the rights of the parties to the suit should be determined. It was clear that the only sum which the mortgagee could receive, *ultra* the interest, was a fixed and unvarying balance of Rs. 565, and this the Courts had found to be a sum which the parties might legitimately agree to fix as the allowance to be made for the costs of collection. The only result, therefore, of compelling the defendant to file accounts would be to increase the costs of suit which must ultimately fall on the plaintiff.

In contracts made after Act XXVIII of 1855 came into force (b) conditions that the mortgagee shall not be called on to account are legal. Section 2 of that Act provides that in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties; and if no rate shall have been agreed upon, at such rate as the Court shall deem reasonable. By section 4, a mortgage or other contract for the loan of money by which it is agreed that the use or usufruct of any property shall be allowed in lieu of interest, shall be binding upon the parties. And by section 6, in adjusting accounts between a mortgagor and mortgagee (under a mortgage made subsequent to the 19th of September 1855) interest shall be calculated at the rate contracted for, or if no rate has been stipulated, and interest is payable

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(b) 19th September 1855.

under the contract, then at such rate as the Court deems reasonable.

It is not uncommon to find a condition that the rate of interest shall be increased on default being made in regular payment, or the like. In such cases, if the contract was made before the Indian Contract Act, 1872, came into force, the question arises whether the interest at the higher rate is to be treated as liquidated damages, *i.e.*, as a sum to be paid in any event by the person making default,—or merely as a penalty.

It has been held that the Act of 1855 does not affect the question of penalty or no penalty, and does not prevent the Courts from deciding whether the condition was or was not intended merely as a penalty (*c*). The question does not turn upon any particular word that may be used. The parties to an instrument cannot change the facts by using a particular name. And whether the sum agreed to be paid is to be treated as a penalty or as liquidated damages is a question of law to be decided by the Court on a consideration of the whole instrument in each case. The mere use of the term “penalty,” or the term “liquidated damages,” or the term “interest,” does not determine the intention. But like any other question of construction, the intention is to be determined from the whole instrument (*d*).

Where there was a mortgage, the principal debt to be repaid in three years, and interest to be paid at the rate of eight annas per cent. per mensem (six per cent. per annum), and the mortgagor agreed, “should I fail to pay the principal and interest as agreed upon I shall pay interest at four per cent. per month (forty-eight per cent. per annum) from the date of this bond to that of liquidation,”—on default

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(*c*) *Bhichuck Nath Panday v. Ram Lochun Singh*, 19 W. R. 271 ; S.C. 11 B. L. R. 135.

(*d*) *Ibid.* Per *Pontifex*, J.

being made at the end of the three years, it was held that the agreement for interest at the higher rate was in the nature of a penalty and not liquidated damages. And the Court gave the mortgagee a decree for interest at the rate of twelve per cent. only, from the date of the mortgage (e).

But all turns on the circumstances of each particular case. Thus where a bond stipulated for a higher rate of interest in the event of default in payment,—providing not an unvarying lump sum but a sum increasing with the term during which the lender was kept out of his money—this was under the circumstances held not to be a penalty, being an appropriate measure of the compensation to be paid to the lender for being deprived of his money (f).

In another case, A borrowed Rs. 20,000 and agreed that, by way of security for the repayment of it with interest at eighteen per cent., he would give an ijara of certain preproperty, and that if he failed to give the ijara he would repay the amount borrowed with interest at the rate of seventy-five per cent. A failed to grant the ijara, and was sued by the mortgagee. And the Court held that the seventy-five per cent. was not intended as a penalty merely, but as an estimate of damages for the breach of contract. “The breach which is provided for in this way is a single act, namely, the not giving the ijara. The reasons which exist in the cases where a sum is agreed to be paid on the non-performance of any one of different acts with different consequences to the party who is entitled to have them performed, for saying that it is a penalty, do not apply to the present case. We have to see what was the intention of the parties independently of

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(e) *Bhichuck Nath Panday v. Ram Lochun Singh*, 19 W. R. 271; S.C. 11 B. L. R. 135. So also *Hurbullubh Narain Singh v. Genda Moharaj*, 20 W. R. 257; *Hurreenath Doss v. Kalee Pershad Roy*, 22 W. R. 474; *Boley Dobey v. Sideswar Rao Baboo Roy Kur*, 4 B. L. R. Append. 92.

(f) *Boolakee Lall v. Radha Singh*, 22 W. R. 223.

any such rule of construction. The value of the security, the advantage which the plaintiff would derive from it, was not capable of precise estimation. It was quite natural that the parties should agree to an estimate of it. And they did so" (g).

But in the case of contracts entered into since the Indian Contract Act, 1872, came into force, questions of this nature turning on the distinction between a penalty and liquidated damages can apparently no longer arise. The present law has been thus stated in a recent case (h) by *Wilson, J.*: "Two rules of law are established by the Legislature of this country:—*First*.—That a man is free to contract to pay any rate of interest that he chooses upon money borrowed; and the Courts must enforce it against him, Act XXVIII of 1855, sec. 2, and there is nothing to hinder him agreeing with regard to the future as well as the present. He may contract to pay no interest at present, but interest hereafter; or to pay one rate of interest now, and a higher or lower rate hereafter. *Secondly*.—By sec. 74 of the Contract Act 'when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of such breach is entitled, whether or not actual damage is proved to have been caused thereby, to receive from the party who has broken the contract, reason-

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(g.) *Zebonnissa v. Brojendro Coomar Roy Chowdhry*, 21 W. R. 352 (on appeal from a judgment of *Markby, J.*, in *Omda Khanum v. Brojendro Coomar Roy Chowdhry*, 20 W. R. 317.) S.C. reported as *Omda Khanum v. Brojendro Coomar Roy Chowdhry*, 12 B. L. R. 451.

(h.) *Mackintosh v. Crow*, I. L. R. 9 Calc. 689, (cf. p. 692). But see the doubt expressed by *Innes, J.* in the recent Madras case of *Vythilinga Mudali v. Ravana Sundarappaygar*, I. L. R. 6 Mad. 167, (cf. p. 169) as to whether sec. 74 of the Contract Act applies to cases in which no definite sum, but only *interest* at a certain *rate*, is named as payable on breach of a contract. Compare also the opinion of the First Judge, Calcutta Small Cause Court, in the order of Reference in *Mackintosh v. Hunt*, I. L. R. 2 Calc. 202 (cf. p. 204).

able compensation not exceeding the amount so named.' This section, it will be observed, does away with the distinction between a penalty and liquidated damages; and this must be borne in mind in dealing with cases decided before the Contract Act, many of which turned on this distinction. Under this section, whether a sum would formerly have been held a penalty or liquidated damages, if it be named in the contract as the amount to be paid in case of breach, it is to be treated much as a penalty was before, as the maximum limit of damages."

In the case before the Court the money was borrowed under a contract for repayment with interest on a certain day, and the contract stipulated that if the money was not paid at the due date it should *thenceforth* carry interest at an enhanced rate. It was held that it could not be said that there was any sum named as to be paid in case of breach, and therefore that the enhanced rate agreed to be paid might be recovered in its entirety (i). After referring to a number of cases (j) in which it had been decided that provisions for payment of an increased rate of interest, in case of default, were penal, the judgment of *Wilson, J.*, proceeded as follows (k). "In all such cases this element is present, that by the terms of the contract a sum is made payable by reason of the breach, capable of calculation at the time of the breach, and payable in all events, though in the second class of cases the payment is spread over a term. But where, as here, the

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(i) *Mackintosh v. Crow*, I. L. R. 9 Calc. 689.

(j) *Rasaji bin Davlaji v. Sayana bin Sagdu*, 6 Bom. H. C. (a. c. j.) 7; *Mashar Ali Khan v. Sardar Mal*, I. L. R. 2 All. 769; *Muthura Persad Singh v. Luggun Kooer*, I. L. R. 9 Calc. 615; *Motoji bin Ratnaji v. Sheikh Husen*, 6 Bom. H. C. (a. c. j.) 8; *Bichook Nath Panday v. Ram Lockun Singh*, 11 B. L. R. 135; *Khurram Singh v. Bhavani Baksh*, I. L. R. 3 All. 440; *Pawa Nagaji v. Govind Ramji*, 10 Bom. H. C. 382.

(k) *Mackintosh v. Crow*, I. L. R. 9 Calc. 689 (cf. p. 693).

contract is merely that if the money is not paid at the due date, it shall *thenceforth* carry interest at an enhanced rate, I do not see how it can be said that there is any sum named as to be paid in case of breach. No one can say at the time of the breach what the sum will be. It depends entirely on the time for which the borrower finds it convenient to retain the use of the money. It is a fresh sum becoming due month by month, or as the case may be, for a new consideration. And, in my opinion, the case falls under the first rule of law above mentioned, not under the second. This view of the law was acted upon by this Court in *Mackintosh v. Hunt* (1).''

This latter was a case in which the Court held that a contract to pay interest at 10 *per cent. per mensem*, if the principal sum secured by a promissory note was not paid on the due date, was not, even though this rate of interest was in the note called a "defaulting rate," in the nature of a penalty. Notwithstanding this expression being used, the contract was in fact merely that if the principal sum be not paid on a certain day, it should from that day bear interest at 10 *per cent. per mensem*. The case seemed to the Court to differ wholly from that class of cases in which a certain sum is agreed to be paid on a breach of contract, and therefore, sec. 74 of the Contract Act (Act IX of 1872) did not apply.

In Madras it has been held (*m*) that though the effect of the 74th section of the Contract Act was to abolish the distinction which had theretofore been recognized by the Courts between the compensations for breach of contracts known respectively as liquidated damages and penalty, the Court has still to determine the question which arose in *Arulu Maistry*

(1) I. L. R. 2, Calc. 202; followed in *Narain Das v. Chait Ram*, I. L. R. 6 All. 179 (*per Tyrrell, J.*)

(*m*) *Fengideswara Putter v. Chatu Achen*, I. L. R. 3 Mad 224 (*cf.* p 228).



v. *Wakuthu Chinnayan* (n) whether the terms of a stipulation in a contract create an independent obligation or ascertain the compensation for the breach of an obligation. In the case last mentioned the stipulation was for the payment of interest at a certain rate up to a certain date, and thereafter for interest at a higher rate, and the Court held that the stipulation did not ascertain compensation for the breach of an obligation, but was in itself an independent obligation (o). But where the stipulation for the payment of interest at the higher rate is to be carried back to the date when the advance is made, its effect is, in the event of a breach of the original obligation, to substitute for it another and more onerous obligation, and therefore it should be regarded as a stipulation for compensation, and only what, under the circumstances, would be a sufficient compensation should be awarded (p).

The provision that a debt shall be payable by instalments is a provision in ease of the debtor. Where therefore a bond is payable by instalments, there is nothing inequitable in a stipulation that if any instalment is not paid at the date at which it falls due, the whole amount shall then become payable (q). And so where a decree, of which the terms had been arranged by *solehnama* between

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(n) 2 Mad. H. C. 205.

(o) *Arulu Maistry v. Wakuthu Chinnayan*, 2 Mad. H. C. 205. Compare also the decisions of the Allahabad High Court in *Tejpal v. Kesri Singh*, I. L. R. 2 All. 621; *Mathura Prasad v. Durjan Singh*, I. L. R. 2 All. 639; *Sarju Prasad v. Beni Madho*, I. L. R. 6 All. 61; *Bhola Nath v. Futeh Singh*, I. L. R. 6 All. 63; *Kunjbehari Lal v. Ilahi Bakhsh*, I. L. R. 6 All. 64.

(p) *Vengideswara Putter v. Chatu Achen*, I. L. R. 3 Mad. 224, followed in *Vythilinga Mudali v. Ravana Sundarappayyar*, I. L. R. 6 Mad. 167; see also *Mazhar Ali Khan v. Sardar Mal*, I. L. R. 2 All. 769; *Kurram Singh v. Bhawani Bakhsh*, I. L. R. 3 All. 440; *Kharag Singh v. Bhola Nath*, I. L. R. 4 All. 8, and *Narain Das v. Chait Ram*, I. L. R. 6 All. 179 (*per Stuart, C.J.*)

(q) *Ragho Govind Paranjpe v. Dipchand*, I. L. R. 4 Bom. 96.

the parties, for payment of money by instalments with interest at 6 per cent. was construed to provide for (among other things) payment of interest at 12 per cent. upon default in payment of an instalment, it was held by the Privy Council that these provisions for double interest were but a reasonable substitution of a higher rate of interest for a lower, in a given state of circumstances, and were not in the nature of a penalty against which equitable relief might be claimed (r).

Again, where by the terms of the mortgage, the mortgagor agreed to pay interest at the rate of one pice per rupee per mensem, and it was provided that the mortgagee was to remain in possession for a period of twenty-five years in lieu of principal and interest, and that the mortgagor was not to claim the property back, unless he paid the principal and interest that might accrue due in twenty-five years from the date of the bond; it was held by the Bombay High Court that this last clause gave an option to the mortgagor, and did not inflict a penalty on him (s).

Where the defendants, having borrowed Rs. 50 from the plaintiff, gave him, on the 9th November 1878, an instrument which was in effect as follows: "*B* (defendant) writes this 'rukka' in favour of *A* (plaintiff) for Rs. 50, cash received, to be repaid on the 13th November 1878, in the event of default he shall pay interest at one rupee per diem." A Full Bench of the Allahabad High Court held that, looking to the whole instrument, it was equitable to hold that the term "interest" was not intended to mean interest in the strict sense of that term, but a penalty, and the amount of interest should be so treated and a reasonable amount only allowed (t). In the judgment of the majority

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(r) *Balkishen Das v. Run Bahadur Singh*, I. L. R. 10 Cal. 305; S.C. L. R. 10 I. A. 162.

(s) *Bapuji Balal v. Satyabhamabai*, I. L. R. 6 Bom. 490.

(t) *Bansidhar v. Bu Ali Khan*, I. L. R. 3 All. 260.

of the Court (*Straight, J., Pearson, J., and Oldfield, J.*) the following observations occur (*u*): "It is true that sec. 2 of Act XXVIII of 1855 provides that, 'in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed on by the parties.' But were the terms of that section strictly applied in every case, it would be impossible to say to what extravagant and extortionate extent the most usurious claims under the name of 'interest' might not be carried. In a country like this, where there is so much borrowing by the ignorant lower classes, who as much require to be protected against themselves as against the money-lenders, a too literal application of the above provision could only be productive of oppression and injustice of the most grievous kind. We entirely concur in the observations made by *Pontifex, J.*, in a valuable judgment in *Bishook Nath Panday v. Ram Lochun Singh (v)*, that the question as to whether 'interest,' as expressed in a document, is to be regarded as interest or a penalty, should be decided according as the intention of the parties can be gathered from the document as a whole. In the present case for example, for each day's default in payment of the principal sum, which by the way was only borrowed for four days, one rupee interest per diem was to be paid, or at the rate of Rs. 730 per cent. per annum. Now, in one sense this may be said to be the 'rate of interest agreed upon between the parties,' if the word interest, being mentioned in the contract, is to be arbitrarily accepted in its strict sense. But we doubt if any Court of Equity would allow itself to be made the medium to enforce terms so monstrous. On the contrary, it seems to us that, were the decision of the case referred before this Court, our plain duty would be to

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(*u*) *Bansidhar v. Bu Ali Khan*, I. L. R. 3 All. 260 (cf. p. 265).

(*v*) 11 B. L. R. 135.

hold that, looking at the entire instrument, the parties intended, when they spoke of interest, a penalty for each day's default in payment of the principal sum; for it must be admitted that one rupee per diem for failure to repay Rs. 50 is, as interest, an extortionate amount, for which no adequate consideration is shown, and which no man would contract absolutely to pay."

And in a more recent case (*w*), decided by *Stuart, C.J.*, and *Straight, J.*, the latter learned Judge referred approvingly to the Full Bench decision in *Bansidhar v. Bu Ali Khan* (*x*), and declared that as far as he could ascertain it had been the uniform practice of that Court, as in numerous instances in the Calcutta and Bombay Courts, to give relief against exorbitant interest as being in the nature of a penalty. The learned Judge went on to express his strong dissent (which dissent *Stuart, C.J.*, most emphatically concurred in) from the decision of the Calcutta High Court in the case of *Mackintosh v. Wingrove* (*y*), where it was ruled that the Court will afford no protection to persons who wilfully and knowingly enter into extortionate and unreasonable bargains.

It is questionable whether the doctrine advanced in these cases, that mere exorbitance in the rate of interest is, of itself and apart from all other circumstances, a sufficient ground for treating interest as penal and giving relief against it, can be supported (*z*). There are no doubt one

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(*w*) *Kharag Singh v. Bhola Nath*, I. L. R. 4 All. 8.

(*x*) I. L. R. 3 All. 260.

(*y*) I. L. R. 4 Calc. 137.

(*z*) It may be noted that this doctrine does not appear to have been necessary for the decision of either of these cases. *Wilson, J.*, has pointed out in *Mackintosh v. Crow* (referred to above) the principle of the Full Bench Ruling in *Bansidhar v. Bu Ali Khan*, while the case of *Kharag Singh v. Bhola Nath* may be supported on the principle laid down in *Vengideswara Putter v. Chatu Achen* (also referred to above).

or two authorities which would seem to favour this view (a), but it has been generally held that something more than mere exorbitance is necessary in order to justify the interference of the Court (b). To quote the words of *Denman, J.*, in a recent English case (c): "The real question in every case seems to me to be the same as that which arose in the case of expectant heirs and reversioners before the special doctrine in their favour was established, that is to say, whether the dealings have been fair, and whether undue advantage has been taken by the money-lender of the weakness or necessities of the person raising the money. Sometimes extreme old age has been unduly taken advantage of, and the transaction set aside. Sometimes great distress, sometimes infancy has been imposed upon, and transactions, though ratified at the full age, have been set aside, because of the original vice with which they were tainted (d). In every case the Court has to look at all the circumstances. In some cases may result the conclusion that there exists mere inadequacy of price or exorbitance of interest charged, in which case the transaction will not be interfered with. But in others, taking the whole history together, it may present so many

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(a) See the cases quoted in *Kedari bin Ranu v. Atmarambhat bin Narayanbhat*, 3 Bom. H. C. (a. c. j.) 11 (cf. p. 18). The only known Indian case is *Lall Beharee Awustee v. Bholanath Dey Chakladar*, 23 W. R. 48.

(b) See *Omdha Khanum v. Brojendro Coomar Roy Chowdhry*, 12 B. L. R. 451 and the cases there cited, especially *Kedari bin Ranu v. Atmarambhat bin Narayanbhat*, 3 Bom. H. C. (a. c. j.) 11. See also *Mackintosh v. Wingrove*, 1. L. R. 4 Calc. 137.

(c) *Nevill v. Snelling*, L. R. 15 Ch. D. 679 (cf. p. 702), and compare the rule laid down in sec. 19 of the Indian Contract Act, 1872.

(d) It is to be observed, however, that in India a minor cannot ratify a contract entered into by him. In this country a minor is not competent to contract at all (see Indian Contract Act, 1872, sec. 11) except for necessities, (*ibid.* sec. 68).

features of unconscientiousness, extortion, and unfair dealing on the one side and weakness on the other, as to compel the Court to exercise its equitable jurisdiction, at all events so far as to restrain the profits of the money-lender within fair and reasonable bounds.”

There are a good many reported cases in which agreements to advance funds required for litigation at a high interest, on the security of a large share of the ultimate profits of the litigation, have been contested on the ground of their being unconscionable and against public policy. In such cases all depends upon the particular character of the transaction. Although the specific English law of maintenance and champerty has not been introduced into India, it seems clear upon the authorities that contracts of this character will under certain circumstances be held to be invalid, as being against public policy. A fair agreement to supply funds to carry on a suit in consideration of having a share of the property if recovered, ought not to be regarded as being *per se* opposed to public policy. Cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner. But agreements of this kind will be carefully watched: and when found to be extortionate and unconscionable so as to be inequitable, —or to be made not with the *bona fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by encouraging and abetting unrighteous suits, so as to be contrary to public policy,—effect ought not be given to them (*e*).

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(*e*) *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, I. L. R. 2 Calc. 233 (P.C.); S.C. L. R. 4 I. A. 23. Followed in India

It not unfrequently happens, that one who has lent money on mortgage, subsequently makes further advances to the mortgagor, it being agreed that the property mortgaged shall be charged with the re-payment of these further advances (*f*). In such cases, the land will be considered as mortgaged for the aggregate amount of the original and subsequent loans. It is, however, only when it is expressly agreed that the subsequent loan shall be a further charge upon the land, that it will be treated as such (*g*).

If loans are made by way of further charge, and questions as to priority arise, the mortgage will, no doubt, as to each particular sum, be considered to bear date only from the time when that sum was charged on the mortgaged lands, and will not, as to the subsequent advances, take the date of the original mortgage contract (*h*). But there are very few reported cases in which such questions of priority have been really discussed or decided.

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in *Abdool Hakim v. Doorga Proshad Banerjee*, I. L. R. 5 Calc. 4; and *Goculdas Jagmohandas v. Lakhmidas Khimji*, I. L. R. 3 Bom. 402. See also *Fischer v. Kamala Naicker*, 8 Moore's I. A. 170; *Chedambara Chetty v. Renga Krishna Muthu Vira Puchaiya Naickar*, L. R. 1 I. A. 241 (cf. p. 265). And see the Indian Contract Act, 1872, sec. 23.

(*f*) *Chujoo Lall v. Joorawun Lall*, S.D.A. N.W.P. 1852, p. 34; *Maharaj Nuwul Kishore Singh v. Syud Inayut Ali*, S.D.A. N.W.P. 1852, p. 248; *Meer Boonyad Ali v. Hursuhaee*, S.D.A. N.W.P. 1852, p. 607; *Mussumat Ranee Sengur v. Mussumat Ranee Rugse*, S.D.A. N.W.P. 1853, p. 112; *Saunders v. Rao Khooman Singh*, S.D.A. N.W.P. 1853, p. 692; *Khyratee Ram v. Mussumat Chenoo*, S.D.A. N.W.P. 1853, p. 726.

(*g*) *Syud Wuzeer Ulee v. Jugmohun Singh*, S.D.A. N.W.P. 1854, p. 465; *Hunooman Pershaud v. Sheo Narayan Sookul*, S.D.A. N.W.P. 1860, p. 122.

(*h*) *Musst. Woseeun v. Bahoo Byjnath Singh*, 25 W. R. 171. See also *Gooroo Pershad Sahoo v. Mussumat Binda Bibee*, 18 W.R. 279.



The further charge ought to be made by a new deed applicable only to the sum to be charged : and when the original mortgage deed is thrown aside, and a fresh deed executed, by which the property is mortgaged for the consolidated sum, there is danger of the original mortgage as well as the further charge being held to rank only from the date of the later deed. Where the question is whether the mortgagee's first security was extinguished by his taking a second security covering the original debt and accumulated interest, the answer will depend mainly upon the intention of the parties. And in one case the Court thought the intention was clearly shewn by the original bond having remained in the possession of the mortgagee (i).

There is a case (j) in which the Lower Court's judgment contained the following passage : " The mortgagor Chujjoo Mull (defendant) urges that the property was in his possession long before plaintiff's mortgage. But all former deeds by which he held are annulled by the last one, under which he holds possession at present. If this were not the case, there was no use in writing a new deed : as this deed is clearly of a subsequent date to that of plaintiff's, it follows that plaintiff holds a prior lien on the property." On this the Agra Sudder Court remarks : " The Court are unanimous in recording their dissent from the doctrine propounded in the foregoing extract. They observe that the ' former deeds ' held by the appellant Chujjoo Mull are by no means ' annulled by the last one, under which he holds possession at present. ' They are, it is true, *superseded* by the latter deed ; but up to the time of the latter instru-

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(i) *Gopee Bundhoo Shantra Mohapattur v. Kalee Pudo Banerjee*, 23 W. R. 338.

(j) *Chujjoo Lall v. Joorawun Lall*, S.D.A. N.W.P. 1852, p. 34. See also *Syud Wuzer Ulee v. Jugmohun Singh*, S.D.A. N.W.P. 1854, p. 465.

ment's execution, the previous deeds, if genuine, must be held to be in full force. The Judge's remark that 'if this were not the case, there was no use in writing a new deed,' is founded on an erroneous view of the case. There was an *obvious* use in the new deed, as it included fresh demands of Chujjoo Mull against the subscribing parties for which the former deeds provided no security; and the amount specified in the new bond represented the consolidated sum due to the bond-holder up to that date, and *repledged* the property, which had been theretofore hypothecated for a smaller sum. Equally unsound is the Judge's declaration 'that as this deed is clearly of a subsequent date to the plaintiff's, it follows that the plaintiff holds a prior lien on the property.' If this doctrine were admitted, a wide door would be opened to fraud; a dishonest debtor, simply by ante-dating a bond, might invalidate a genuine deed of later date. The question for decision in the present case is, not the order of dates in the conflicting deeds, but whether the owners of the property in dispute were competent to execute the bond which constitutes the plaintiff's cause of action, which they clearly were *not* if the authenticity of Chujjoo Mull's deeds of the 8th October 1824, and 17th April 1833, 'be admitted,'—which deeds, or one of them, must apparently have contained a proviso against alienation by the mortgagor until the debt was paid off.

A mortgagor having made some payments, the accounts between him and the mortgagee were made up, and a fresh mortgage deed executed which, after reciting the previous mortgage and the payments in respect of it, again mortgaged the same property on the same terms as those contained in the original mortgage deed, as a security for the unliquidated balance. The original mortgage deed was then given up and cancelled. The mortgagor had mortgaged the same property to a third party subsequent to the

date of the original mortgage, but prior to the mortgage given as security for the balance. The Court considered that this latter mortgage was merely a *continuation* of the first mortgage, and that the substitution of the last deed for the first did not terminate the first mortgage, or give priority to the third party to whom the property had been intermediately mortgaged (*k*).

And the mere fact that the second mortgage includes property to which the first mortgage did not extend, does not necessarily cause a substitution of securities. The question whether the earlier mortgage has become merged and extinguished is still one to be decided from the intention of the parties. So where the Court found that the transaction between the parties was in point of fact only a giving of further security in consequence of the original debt having become increased by large arrears of unpaid interest, it held that no merger or extinguishment of the previous mortgage in the latter one had occurred (*l*).

Where *F* on the 7th February 1873 mortgaged the equity of redemption of a certain estate to *B* and *G*, and subsequently on the 6th October 1877 mortgaged the same estate to *B* and *D*, the consideration for the second mortgage consisting, partly of a sum, which was taken to be the total amount of principal and interest due on the first mortgage, (of which sum *B*'s share was considered as paid to him, and *G*'s share was left in the hands of *B* who was to discharge *G*), and partly of a further sum paid in cash to *F*, the Court held that the lien created by the first mortgage was extinguished, and therefore that the right of the holder of a mortgage created prior to the mortgage of the 6th October 1877, though subsequent to the mortgage of the

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(*k*) *Roy Kishoree Singh v. Umrit Lal*, S.D.A. 1856, p. 942; *Shah Koondunlal v. Juddoonath Pandey*, S.D.A. 1857, p. 1184.

(*l*) *Goluknath Misser v. Lallu Prem Lal*, I. L. R. 3 Calc. 307.

7th February 1873, was to be preferred to that of the transferee under a sale in execution of a decree for the enforcement of the lien created by the mortgage of the 6th October 1877. It seemed clear to the Court, from the terms of the mortgage of October 1877, and the mode in which the money advanced under it was disposed of, that the first mortgage was regarded as defunct and at an end, and that an entirely fresh transaction with a new mortgagee in the person of *D* was entered into (*m*).

When a person admits having executed a written instrument which contains a recital that the consideration has been received, but seeks to avoid liability by pleading that full consideration according to the terms of the contract has not been received by him, the proof of such non-receipt rests upon *him*, and in the absence of proof he must be held to the terms of the document to which he has affixed his signature. The written instrument is *primâ facie* evidence that the consideration has been received as recited, but it is not conclusive; and this *primâ facie* evidence may be rebutted (*n*). For the provisions of the Indian Evidence Act, 1872, sec. 92, do not prohibit the disproof of a recital in a contract as to the consideration that has passed by showing that the actual consideration was something different to that alleged (*o*).

But these principles are applicable only as between the parties who make the instrument. A recital in a deed or other

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(*m*) *Badri Prasad v. Dawlat Ram*, I. L. R. 3 All. 706.

(*n*) *Janeswar Dass v. Mahabeer Singh*, L. R. 3 I. A. 1.; *Ram Surun Singh v. Mussamut Pran Peary*, 13 Moore's I. A. 551; *Kalepershad Tewaree v. Rajah Sahib Perhlad Sein*, 12 Moore's I. A. 311; S.C. 2 B. L. R. (P.C.) 111; *Chowdry Deby Persad v. Chowdry Dowlut Sing*, 3 Moore's I. A. 347; S.C. 6 W. R. (P.C.) 55; *Fulli Bibi v. Bassirudi Midha*, 4 B. L. R. (F.B.) 54; *Radhanath Banerjee v. Jodoo-nath Singh*, 7 W. R. 441.

(*o*) *Vasudeva Bhatlu v. Narasamma*, I. L. R. 5 Mad. 6.

instrument is no more evidence as against third parties than any other statement would be (p).

The deed of conveyance of certain land in Calcutta recited that the vendor was "seized of or otherwise well entitled to" the property intended to be sold "for an estate of inheritance in fee simple," and it purported to convey such an estate. In a suit for dower by the vendor's widow against the heirs of the purchaser, it was held that, although as between the plaintiff, (who was no party to the deed) and the defendants there was no estoppel which could prevent the defendants from proving that the estate sold was other than an estate in fee simple, yet, as the purchaser bought the property as and for an estate of inheritance and paid for it as such, the recital was *prima facie* evidence against the purchaser and persons claiming through him that the estate conveyed was what it purported to be, it being an admission by conduct of parties which amounted to evidence against them (q).

Where an instrument has been deliberately executed and has been acted on for many years, every presumption is to be made in favor of the statements made in it (r).

In a case where a recital of payment of consideration was made with a fraudulent object, the Court refused to allow oral evidence to be given to prove that no consideration had in fact been paid (s).

Where the obligee had fraudulently altered a bond, under which a certain share of a village had been hypothecated so as to make it appear that a larger share of the village had been

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(p) *Brajeshware Peshakar v. Budhanuddi*, I. L. R. 6 Calc. 268.

(q) *Sarkies v. Prosonomoyee Dossee*, I. L. R. 6 Calc. 794.

(r) *Janeswar Dass v. Mahabeer Singh*, L. R. 3 I. A. 1; *Kaleepershad Tewaree v. Rajah Sahib Perhlad Sein*, 12 Moore's I. A. 311; S.C. 2 B. L. R. (P.C.) 111.

(s) *Mussamut Ramdee Koonwaree v. Baboo Shih Dyal Singh*, 7 W. R. 334.

hypothecated, it was held that the bond must be rejected as evidence of the hypothecation of the village, and therefore that a suit brought by the obligee on the bond for the recovery of the money due by sale of the hypothecated property, must be dismissed (t).

Where a trustee, alleging that the trust property, consisting of land, was his own, mortgaged it, and the mortgagee, who took the mortgage in good faith, for valuable consideration and without notice of the trust, obtained a decree against the trustee for the sale of the land, and the land was sold in execution of that decree, it was held, in a subsequent suit by the trustee, to which none of the beneficiaries under the trust were parties, for possession of the land on the ground that it was trust property, and that he had no power to transfer it, that the plaintiff was estopped by his conduct from recovering possession (u).

But where the plaintiff sued the defendant on mortgages executed in favor of the plaintiff by the adoptive mothers of the defendant (who were also defendants) subsequently to his adoption, and the plaintiff contended that the mortgages had become effectual as against the defendant by reason of his subsequent conduct, inasmuch as it was proved that he had promised his adoptive mothers to redeem the mortgages, and had stood by and allowed the plaintiff to carry out the provisions of the mortgage deeds to his own detriment by paying maintenance to the defendant's adoptive mothers, and by paying off certain mortgages which had been created by them previously to the adoption of the defendant, it was held that the defendant was not liable upon the mortgages.

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(t) *Ganga Ram v. Chandan Singh*, I. L. R. 4 All. 62 ; and compare the principles laid down in *Gogun Chunder Ghose v. Dhuronidhur Mundul*, I. L. R. 7 Calc. 616 ; *Oodeychand Booduji v. Bhaskar Jagonnath*, I. L. R. 6 Bom. 371 ; and *Sitaram Krishna v. Daji Devaji*, I. L. R. 7 Bom. 418.

(u) *Gulzar Ali. v. Fida Ali*, I. L. R. 6 All. 24.

His promise to redeem the mortgages was not made to the plaintiff but to his adoptive mothers, and there was no consideration for such promise as he made. Nor could the promise have the effect of ratification, for the ratification of the unauthorized contract of an agent can only be effectual when the contract has been made by the agent avowedly for or on account of the principal, and not when it has been made on account of the agent himself. Moreover, knowledge on the part of the defendant, that the plaintiff was carrying out the provisions of the mortgage deeds, and his allowing the plaintiff to do so, did not estop him from disputing them afterwards, for it was no part of his duty to step in and protect the plaintiff against the consequences of his own unauthorized dealings with his property (*v*).

Where the plaintiff, alleging that he was the proprietor of certain land, that defendant No. 2 had wrongfully and fraudulently mortgaged it to defendant No. 1, and that defendant No. 1 had applied for foreclosure of the mortgage, and notice of foreclosure had issued, claimed "that the mortgage-deed being set aside, the land be protected from the illegal foreclosure, by cancelment of the foreclosure proceedings," it was held that the suit was not strictly one for the cancelment or setting aside of an instrument to which the limitation in Art. 91, Sch. II of the Limitation Act, 1877, would apply, but rather one for a declaratory decree (*w*).

It has been held that a Court ought not to make a decree for specific performance of an agreement to lend money on mortgage. The mortgagor may obtain compensation or damages in a properly framed suit against the mortgagee for breach of his contract; or where a mortgage has been executed and delivered to the mortgagee who refuses to

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(*v*) *Shiddheshwar v. Ramchandravar*, I. L. R. 6 Bom. 463.

(*w*) *Sobha Pandey v. Sahodra Bibi*, I. L. R. 5 All. 322.



pay the whole of the consideration money due under the mortgage, the mortgagor may redeem the mortgage on payment of the sum due if he wishes to prevent the mortgagee from assigning the mortgage (*x*). This case was decided before the Specific Relief Act, 1877, came into force, but a decision under the provisions of that Act would apparently be the same (*y*).

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(*x*) *Anakaran Kasmi v. Saidamadath Avulla*, I. L. R. 2 Mad. 79.

(*y*) See Act I of 1877, sec. 21.

## CHAPTER V.

### OF THE REGISTRATION OF INSTRUMENTS OF MORTGAGE.

No particular ceremony is required on the execution of an instrument of mortgage; but it is desirable that it should be executed in the presence of at least two credible witnesses. A deed is not necessarily void simply because some of those who are named as parties to it do not sign it. In such a case the deed will, so far as circumstances admit, be binding on those who execute it, but it will not affect those who do not (*a*). But where two out of certain co-sharers in a patni taluk executed a mortgage-bond with the object of paying off a quota of the rent due on the estate, the Court held that the liability under the bond only extended to the co-sharers who actually signed the document and to such of the other co-sharers as, by their presence at the time when the bond was executed, might impliedly be considered to have acquiesced in such execution (*b*).

Delivery of the document which evidences the transfer of property is not a necessary condition to the perfectness of the conveyance; but, generally speaking, delivery evidences the completeness of the transaction, and non-delivery will operate very powerfully against the recognition of any claim founded upon the deed (*c*).

It is generally to the advantage of all parties concerned, especially of mortgagees, to give as much publicity as pos-

(*a*) *Thakoordeen v. Waris Khan*, S.D.A. N.W.P. 1856, p. 72.

(*b*) *Mohesh Chunder Banerjee v. Ram Pursono Chowdry*, I.L.R. 4 Calc., 539.

(*c*) *Mussumat Ummun Beebee v. Moulvee Mohamed Oomer*, S.D.A. N.W.P. 1849, p. 219. See also *Gowal Dass v. Soorajpershad*, S.D.A. 1850, p. 364.

sible to all contracts regarding land: and they ought to be brought forward on any occasion on which the rights of parties in the pledged land are under discussion,—as for example, when a settlement is going on. If people will not avail themselves of the simple means afforded of giving publicity to these transactions regarding land, they have only themselves to blame if the reality of the transactions is doubted when they are, after a lengthened interval, for the first time declared to have taken place (*d*).

Registration must be considered with reference to the old law and to the new. Under the old law, the registration of documents was voluntary. Under the new law, it is practically compulsory; and it is impossible for intending mortgagees to be too particular or careful as to the registration of their documents. Their whole security depends upon registration, and it ought always to be insisted upon and carried out with the utmost strictness and at the earliest possible moment.

The present system of registration may be said to have been initiated in 1864. In that year was passed the first of the new Registration Acts, XVI of 1864, subsequently amended by Act IX of 1865. The next Act was XX of 1866, which repealed Acts XVI of 1864 and IX of 1865 and declared (sec. 3) that “all things duly done under the same Acts or either of them shall be considered as having been done under this Act.” Act XX of 1866 came into force on the 1st of May 1866: and was in substance similar to (though differing in certain important respects from) the Acts which it repealed. Act VIII of 1871 came into force on the 1st of July

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(*d*) *Mussumat Zynub Begum v. Begma Beebee*, S.D.A. N.W.P. 1850, p. 333; *Mohumed Nadir Ali v. Sheikh Kureem Ali*, S.D.A. N.W.P. 1853, p. 542; *Sham Lall v. Mooklal Singh*, S.D.A. N.W.P. 1853, p. 601; *Neelkaunth Dutt v. Anundmoye Chowdraine*, S.D.A. 1855, p. 218. See also *Brojonath Koondoo Chowdry v. Khelut Chunder Ghose*, 14 Moore's I.A. 144 (cf. p. 151).

1871. It repealed Act XX of 1866, of which in truth it was merely an improved edition with certain alterations which it is unnecessary to specify here. Act VIII of 1871 has in turn been repealed by Act III of 1877, which is the law now in force and is little more than a re-enactment of the Act which it repeals.

The registration of all instruments of mortgage, in which the property mortgaged is of the value of one hundred rupees or upwards, executed on or after the 1st of January 1865, is compulsory. So also is the registration of all instruments which acknowledge the receipt or payment of any consideration for a mortgage,—and of leases of immoveable property from year to year or for any term exceeding one year, or reserving a yearly rent (*e*). If the property be less than one hundred rupees in value, registration is optional (*f*). Under Act III of 1877, whether the registration is compulsory or optional, the instrument must be presented to the Registrar for registration within four months from the date of execution (*g*). But if owing to urgent necessity or unavoidable accident any document executed in British India is not presented for registration till after the expiration of the four months, the Registrar, in cases where the delay in presentation does not exceed four months, may direct the document to be accepted for registration, on payment of a fine not exceeding ten times the amount of the proper registration fee (*h*). But a document purporting to have been executed by any of the parties to it out of British India, may be registered after the usual period, if the registering officer is satisfied that

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(*e*) Act III of 1877, sec. 17; and compare the provisions of sec. 59 of the Transfer of Property Act, 1882.

(*f*) Act III of 1877, sec. 18.

(*g*) *Ibid.* Sec. 23.

(*h*) *Ibid.* Sec. 24.

the instrument was so executed, and that it has been presented for registration within four months after its arrival in British India (*i*). And not only must the document ordinarily be presented within four months, but (*j*) the persons executing the document, or their duly authorised agents or representatives, must also appear within the four months before the registering officer. If, however, owing to urgent necessity or unavoidable accident, all such persons do not appear within the four months, the Registrar—if the delay does not exceed four months—may direct that on payment of a fee not exceeding ten times the proper registration fee, the document may be registered(*k*).

When a registration office is closed on the last day of the period within which an instrument ought ordinarily to be presented for registration, the presentation will be deemed within time if made on the day on which the office re-opens (*l*).

A registered document operates from the time from which it would have commenced to operate if no registration were required or made, and not from the time of its registration (*m*).

All documents not testamentary, duly registered and relating to any property whether moveable or immoveable, take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession (*n*).

No document, the registration of which is compulsory,

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(*i*) Act III of 1877, sec. 25.

(*j*) *Ibid.* Secs. 32, 34.

(*k*) *Ibid.*

(*l*) *Ibid.* Sec. 26.

(*m*) *Ibid.* Sec. 47, and see *Santaya Mangarsaya v. Narayan*,  
I L. R. 8 Bom. 182.

(*n*) *Ibid.* Sec. 48.

affects any immoveable property comprised in it, nor can it be received as evidence of any transaction affecting such property, unless it has been duly registered (*o*).

Every instrument of mortgage, assignment, reconveyance or relinquishment, and every instrument which acknowledges the receipt or payment of any consideration on account of a mortgage, assignment, reconveyance or relinquishment,—whether the registration of it is compulsory or optional,—shall, if duly registered, take effect as regards the property comprised therein against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not (*p*). And in cases where the earlier Acts were in force in the place and at the time in and at which the unregistered document was executed, “unregistered” means not registered under such Acts,—and where executed after the 1st of July 1871 means not registered under Act VIII of 1871 or the present law (*q*).

A document must ordinarily be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which it relates is situate (*r*).

If all or any of the persons by whom the document presented for registration purports to be executed deny its execution, or if any such person appears to be a minor, an idiot or a lunatic, or if any person by whom the document purports to be executed is dead, and his representative or assign denies its execution, the registering officer must refuse to register the document (*s*). It has been held,

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(*o*) Act III of 1877, sec. 49.

(*p*) *Ibid.* Sec. 50. See sec. 48.

(*q*) *Ibid.* Sec. 50.

(*r*) *Ibid.* Sec. 28.

(*s*) *Ibid.* Sec. 35.

however, by the Privy Council that this section is to be read distributively, and construed to mean that the registering officer must refuse to register the document only *quoad* the persons who deny the execution of the deed, and *quoad* such persons as appear to be under any of the disabilities mentioned (t). So where at the registration of a bond executed on behalf of a minor by his father, the minor was not represented for the purpose of registration by any one, it was held that the bond should not affect any immoveable property comprised therein in so far as the minor was interested in the same (u).

If a person presenting a document for registration desires the appearance of any person (whether an executant or a witness) whose presence or testimony is necessary for the registration of the document, he can through the registering officer take means to enforce the appearance of such person (v). And it is usually desirable that, if there is any delay on the part of executants in completing the registration, proceedings to enforce their attendance, &c., should be taken promptly, as the position of the person who claims under the document and seeks registration is always one of great difficulty and risk, to say the least of it, after the four months have expired (w).

The Registrar acts without authority if he registers a document which has not been presented for registration within the period prescribed by law (x). It is not a mere defect of procedure. And registration can be insisted on only when a document has been presented within the pre-

(t) *Muhammad Ewaz v. Birj Lal*, I. L. R. I All. 465 (P. C.).

(u) *Shankar Das v. Jograj Singh*, I. L. R. 5 All. 599.

(v) Act III of 1877, secs. 36-39.

(w) See *In the matter of the Registration Act, 1871*, and *In the matter of Buttobehary Banerjee*, 11 B. L. R. 20.

(x) See Part IV of Act III of 1877, and *Raya Raghoba Kamat v. Anapurnabai Kom Subalhat*, 10 Bom. H. C. 98.



scribed time and the requirements of the law for the time being in force have been complied with on the part of the person seeking registration, so as to entitle the document to registration (y). But the acts and formalities which accompany and constitute the act of registration are matters of procedure,—and the law declares that nothing done in good faith pursuant to the Registration Acts by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure (z).

Thus where a son had admitted at the time of registration of an instrument that it had been executed by his deceased father, and the Registrar had recorded that the son had admitted the execution, but the son's signature had not been endorsed on the instrument, the Court held this to be a mere defect in procedure and therefore that it did not invalidate the registration (a). But in another case, where a bond, confirming a deed of sale, which required to be registered, but had not been registered within the prescribed time, was presented for registration with the deed of sale annexed thereto, and by mistake or for some other reason the particulars to be endorsed on a document admitted to registration, and the certificate showing that a document had been registered were endorsed on the deed of sale and not on the bond, the Court held that the bond was to all intents and purposes unregistered, as the provisions of secs. 58, 59, and 60 of the Registration Act had not been

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(y) Act III of 1877, secs. 74, 76. And see *Monmohinee Dossee v. Bishen Moyee Dossee*, 7 W. R. 112; *Oojul Mundul v. Herasutoollah Mundul*, 7 W. R. 150.

(z) Act III of 1877, sec. 87, which is similar to Act XX of 1866, sec. 88, and Act VIII of 1871, sec. 85; as to which see the remarks of the Privy Council in *Sah Mukhun Lall Panday v. Sah Koondun Lall*, 15 B. L. R. 228; and *Muhammad Ewaz v. Birj Lal*, 1 L. R. 1 All. 465. See also *Ikbal Begam v. Shum Sundar*, 1 L. R. 4 All. 384.

(a) *Man Bhari v. Nannidh*, 1 L. R., 4 All. 40.

complied with, and that this defect was not merely a "defect of procedure" within the meaning of sec. 87 of the Act (b).

Among other particulars which are to be endorsed by the Registrar upon every document admitted to registration are the following (c),—"any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration in whole or in part made in his presence in reference to such execution." And the registering officer's certificate indorsed on the document is admissible for the purpose of proving not only that the document has been duly registered but that the facts mentioned in the endorsement (*i.e.*, as to payment of money, acknowledgment of receipt of consideration and the like) occurred as therein mentioned (d). So that if the parties choose to avail themselves of the provisions of the law, they may at the same time that they register their deeds, secure the means of being able to give satisfactory proof of the consideration. But admissions of receipt of consideration are not among the particulars which the Registrar was directed by Act XVI of 1864, sec. 36, to endorse (e).

Where a complete title as mortgagee was acquired, with possession, before the passing of Act XVI of 1864, the mortgage, though unregistered, was held good as against a subsequent mortgage or sale executed and registered under one of the later Acts (f). So, where A purchased lands in 1866 and duly registered his bill of sale,—but B had purchased the same lands in 1855 from the

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(b) *Mathura Das v. Mitchell*, 1 L. R. 4 All. 206.

(c.) Act III of 1877, sec. 58, cl. c,—which is similar to Act VIII of 1871, sec. 58, cl. 3, and Act XX of 1866, sec. 66, cl. 3.

(d) Act III of 1877, sec. 60.

(e) *Goor Pershad v. Nunda Singh*, 1 N.W.P. (Agra) H.C. 160.

(f) *Sreemutty Fyezoonnissa v. Moulvie Sadutoollah*, 22 W. R. 3.

persons through whom *A*'s vendors made title, and had been in possession ever since, without having registered his deed of sale,—and *A* sued for possession, the Court held that *B* was not bound to register and that his title was good (*g*). But it would be otherwise, if the first mortgagee or purchaser had never had possession, and the later purchaser or mortgagee (whose deed was registered) got possession. Thus where *A* mortgaged land in 1859 to *B*, but the mortgage deed was not registered, and *A* in 1867 sold the same property to *C* the deed of sale to whom was duly registered, and *C* held possession from the date of his purchase, it was held that *C* having registered his deed of sale and being in possession, his title was good as against *B* who never had possession (*h*). So where the prior unregistered claimant once had possession but was dispossessed by the subsequent registered purchaser,—a suit by the former for possession, on declaration of the superiority of his title, was dismissed (*i*). And there are certain decisions in which the same rule has been laid down where both the titles arose after the later Acts came into force—the prior title unregistered but accompanied by possession being supported as against the subsequent title registered, but not accompanied by possession (*j*).

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(*g*) *Girija Singh v. Giridhari Singh*, 1 B.L.R. (a. c. j.) 14.

(*h*) *Soodharam Bhattacharjee v. Odhoy Chunder Bundopadhyaya*, 10 B. L. R. 380. See also *Mofuzel Hossein v. Golam Ambiah*, 10 B. L. R. 381 (note).

(*i*) *Issuree Dossee v. Lall Beharee Holdar*, 21 W. R. 421.

(*j*) *Narain Doss v. Gungaram Dhara*, 20 W. R. 287; *Indro Narain Bal v. Foolmani Bewah*, unreported, but cited by *Field, J.*, in *Dinonath Ghose v. Auluck Moni Dabee*, 1 L. R. 7 Calc. 753, (cf. p. 761.) See also *Selam Sheikh v. Baidonath Ghatak*, 3 B. L. R. (a. c. j.) 312; *Narsing Porkaet v. Mussamat Bewah*, 5 B. L. R. (append. 86); but these cases proceeded upon sec. 48, and not upon sec. 50 of Act XX of 1866 as noticed by *Garth, C.J.*, in *Fuzludeen Khan v. Fakir Mahomed Khan*, 1 L. R. 5 Calc. 336, (cf. p. 341).

In the latest of these (*k*) decided by *Field* and *Prinsep*, JJ., it was held, after an elaborate judgment by *Field*, J., in which all the previous cases were considered, that one who is in possession of property under an unregistered deed of sale, the registration of which is not compulsory, has a superior title under sec. 50 of Act III of 1877 (*l*) to one who sets up a registered conveyance of a later date, the second purchaser presumably having notice of the title of the first purchaser from the fact of possession having been given. *Field*, J., was further inclined to support the view that delivery of possession of the property sold is under the Hindu law essential to complete the title of the vendee.

But this case has been recently overruled by the majority of a Full Bench of the Calcutta High Court, *Prinsep*, J., alone dissenting (*m*). The judgment of the Full Bench, which was delivered by *Pontifex*, J., contains the following very decided expression of opinion: "We are of opinion that the fact of the vendor having given possession to the first and unregistered purchaser, even if such possession continued to the date of the second conveyance, does not necessarily prevent the operation of that part of sec. 50 of the Registration Act, which enacts broadly that a registered document shall 'take effect as regards the property therein comprised against every unregistered document relating to the same property;' and that the only case in which the title of the prior unregistered purchaser can prevail against the subsequent registered purchaser for value is

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(*k*) *Dinonath Ghose v. Auluck Moni Dabee*, I. L. R. 7 Calc. 753.

(*l*) *Query*.—Was Act III of 1877 applicable to this case? According to the facts as stated in *Field*, J.'s judgment, all the deeds were executed before that Act came into force; so unless sec. 50 of the Act be held to be retrospective (as to which see *infra* p. 194) it is difficult to understand the application of the Act.

(*m*) *Narain Chunder Chuckerbutty v. Dataram Roy*, I. L. R. 8 Calc. 597.

when the latter takes with notice of the title of the former (n). We think that the observations of Lord Cairns in the (lately reported) case of the *Agra Bank, Limited, v. Barry* (o) are applicable to cases under sec. 50 of the Indian Registration Act. We are further of opinion that delivery of possession is not, under the Hindu law, essential to complete the title of a purchaser for value" (p).

By this decision the Full Bench affirmed a previous case (q) in which *Garth, C.J.*, and *Pontifex, J.*, had given a like ruling under the very similar provisions of sec. 50 of Act VIII of 1871. In that case, however, the competition was between optionally registerable documents being the only competition possible previous to the Act of 1877 (r), whilst in the Full Bench case the competition was between a compulsorily registered and an optionally registerable document, a competition which Act III of 1877 first permitted (s).

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(n) As to this point, however, see the recent case of *Bamsundari Dassi v. Krishna Chandra Dhur*, I. L. R. 10 Calc. 424, in which *Field, J.*, characterizes this portion of the Full Bench's decision as an *obiter dictum*, and declares that the point can scarcely be said to have been settled by the decisions of the Court.

(o) L. R. 7 H. L. 135 (cf. pp. 157, 158).

(p) A different rule, however, prevails in the case of gifts. See *Dagai Dabee v. Motkura Nath Chattopadhyaya*, I. L. R. 9 Calc. 854; and compare *Vasudev Bhat v. Narain Daji Damle*, I. L. R. 7 Bom. 131.

(q) *Fuzludeen Khan v. Fakir Mahomed Khan*, I. L. R. 5 Calc. 336.

(r) See *Oghra Singh v. Ablakhi Koor*, I. L. R. 4. Calc. 536; *Bhola Nath v. Baldeo*, I. L. R. 2 All. 198; *Lakshmandas Sarupchand v. Dasrat*, I. L. R. 6 Bom. 168, (F.B.) (cf. p. 190); *Rupchand Dagdusa v. Darlatrav Vithalrav*, I. L. R. 6 Bom. 495; *Venkayya v. Kotayya*, I. L. R. 6 Mad. 153; but see *Muthanna v. Alibeg*, I. L. R. 6 Mad. 174, in which the opinion of the Court on this point appeared to be *contra*.

(s) *Shib Chandra Chakravarti v. Johobur*, I. L. R. 7 Calc. 570; *Lachman Das v. Dip Chand*, I. L. R. 2. All. 851 (F.B.); *Abdul Rahim v. Ziban Bibi*, I. L. R. 5 All. 593; *Nallappa Goundan v. Ibram Sahib*, I. L. R. 5 Mad. 73; *Kanitkar v. Joshi*, I. L. R.

The opinion of the Madras High Court on this question of possession does not differ from that expressed by the Calcutta Full Bench. It has been held by that Court both under the Act of 1871 (*t*) and that of 1877 (*u*) that a prior unregistered document, of which the registration is optional is, even though accompanied with delivery of possession of the land affected thereby, liable to be defeated by a subsequent registered document. The Madras High Court has, however, gone further than the Calcutta Court, inasmuch as it has held that the doctrine of notice does not apply at all to cases falling under sec. 50 of the Registration Act.

Thus in a case in which it was found that the subsequent registered purchasers had bought with full knowledge of the plaintiff's prior unregistered mortgage, the Court held that the effect of sec. 50 of Act III of 1877 was not modified by this fact (*v*). Referring to the Calcutta case of *Fuzludeen Khan v. Fakir Mahomed Khan* (*w*), the High Court said: "The Appellate Court held that the first sale was, according to the intention of the Legislature, subject to the risk of the title of the vendee being displaced by a subsequent innocent purchaser without notice, whose conveyance was duly registered. We agree in this view except that, we think, the effect of registration is altogether independent of notice. In the case just referred to, the question of the effect of notice did not arise, and therefore the case is hardly an authority upon the point.

The earliest law on the subject in this Presidency is Regulation XVII of 1802. By clause 3 of section 6 of that

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5 Bom. 442; *Ichharam Kalidas v. Govindram Bhowanishankar*, I. L. R. 5 Bom. 653.

(*t*) *Bimaraz v. Papaya*, I. L. R. 3 Mad. 46.

(*u*) *Kondayya v. Guruvappa*, I. L. R. 5 Mad. 139.

(*v*) *Nallappa Goundan v. Ibram Sahib*, I. L. R. 5 Mad. 73. See also *Kondayya v. Guruvappa*, I. L. R. 5 Mad. 139.

(*w*) I. L. R. 5 Calc. 336.

Regulation it was provided that, where there was notice by a subsequent purchaser of a prior unregistered deed, the registration of his own subsequent deed would not invalidate the prior deed, though it would without notice. Act XIX of 1843 did away with the doctrine of notice which has never since been expressly revived. There is nothing about notice to be found in the Acts of 1864, 1866, 1871 or 1873 (1877?). Have we any right to import this doctrine? Were we to do so, notice, it cannot be doubted, would be set up in almost every case, and the Act would be rendered to a great extent inoperative.

The plain words of the Act are—‘shall if duly registered take effect, as regards the property comprised therein, against every unregistered document relating to the same property,’ &c. The words are used without any qualification, and, we think, we should not be giving effect to the Act if we treated the circumstance of second, third and fourth defendants having notice (as is found) of plaintiff’s unregistered document as one which bars the operation of sec. 50 of the Registration Act.”

And in a more recent case it was held by the same Court that a registered purchaser of land who had bought in 1878 with full notice of an unregistered hypothecation deed of 1872, of which the registration was optional, was entitled to hold the land free of such encumbrance, and the fact that subsequent to the execution of the registered sale deed, a decree was obtained upon the hypothecation deed, declaring the land liable to be sold in default of payment of the amount of the decree, did not affect the title of the registered purchaser (x).

In Bombay there do not appear to be any reported cases in which the question, whether an unregistered document accompanied by possession is good as against a subsequent registered one, has been expressly decided under the Acts of

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(x) *Madar Saheb v. Subbarayalu Nayudu*, I. L. R. 6 Mad. 88.



1871 or 1877. But there are cases both under the old law (y) and under the later law as contained in Act XX of 1866 (z) in which this question has been considered and effect given to the prior unregistered document. And the views expressed by the Court in certain recent cases (a) would seem to indicate that a like ruling would be given under the later Acts. In those cases it has been held that the general rule in the Presidency of Bombay is that, among Hindus and Mahomedans, possession is necessary in order to perfect a transfer of immoveable property by mortgage or deed of sale as against subsequent incumbrancers or purchasers for value without notice (b); that the main ground of this rule is that possession is notice to all subsequent intending incumbrancers or purchasers of the title of the party in possession, but that registration amounts to notice, and therefore atones for the absence of, and is a sufficient substitution for, possession in the validation of title where the instrument *earlier in date* has been registered *prior to the execution of the second instrument* (c). From these principles it would seem probable that an unregistered mortgage would, if accompanied by possession, be held to be good, even under the Acts of 1871 and 1877, as against a subsequent registered mortgage, on the

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(y) *Balaram Nemchand v. Appa valad Dulu*, 9 Bom. H.C. 121.

(z) *Mammal valad Suratmal v. Dashrath valad Narayan*, 9 Bom. H.C. 147.

(a) *Lakshmandas Sarupchand v. Dasrat*, I. L. R. 6 Bom. 168; *Sobhagchand Gulabchand v. Bhaichand*, I. L. R. 6 Bom. 193 (F.B.). See also *Lalubhai Surchand v. Bai Amrit*, I. L. R. 2 Bom. 299. See also pp. 6 and 7 *supra* where these cases are referred to.

(b) For the view of the Court as to the effect of notice even when the competition is between a prior unregistered and a subsequent registered document, see *Shivram v. Genu*, I. L. R. 6 Bom. 515.

(c) As to this point see *Hasha v. Ragho Ambo Gondhali*, I. L. R. 6 Bom. 165; *Radhabai v. Shamrav Vinayak*, I. L. R. 8 Bom. 168 (cf. p. 72). But see *Vasudev Bhat v. Narayan Daji Damle*, I. L. R. 7 Bom. 131.

ground, that the subsequent mortgagee had at the time of taking his mortgage notice of the prior mortgage through the fact of the possession by the prior mortgagee.

But the principle that "possession or registration is necessary to validate a mortgage in the Deccan or elsewhere in the Presidency of Bombay, except Gujerat" (where *San* mortgages (*d*) or mortgages without possession are judicially recognized) does not apply in the case of a purchaser at a judicial sale. The purchaser of the right, title and interest of a judgment-debtor at a Court sale takes only that which the judgment-debtor could honestly dispose of, and as a mortgage without possession would bind the mortgagor himself, the judgment-debtor could honestly sell only subject to the mortgage (*e*).

Further it would seem that the provisions of sec. 50 of the Registration Act apply only where two documents are antagonistic, but not where effect can be given to each without infringement of the other. So if *A* mortgages to *B* and afterwards *C* purchases at a Court sale the then existing right, title and interest of *A*, *C* buys merely the equity of redemption. Registration therefore cannot help him, for on the very face of his certificate of sale the property comprised therein is not the property previously mortgaged to *B*, but only the residue of *A*'s estate after such mortgage (*f*).

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(*d*) A plea of purchase for valuable consideration and without notice does not avail to defeat a prior *san*-mortgage of the same property. *Naran Purshotam v. Dolatram Virchand*, I. L. R. 6 Bom. 538 (F.B.). See also *Sobhagchand Gulabchand v. Bhaichand*, I. L. R. 6 Bom. 193 (cf. p. 201) (F.B.).

(*e*) *Sobhagchand Gulabchand v. Bhaichand*, I. L. R. 6 Bom. 193 (F.B.); *Bapuji Balal v. Satyabhamabai*, I. L. R. 6 Bom. 490.

(*f*) See the remarks of *Melville, J.*, in *Sobhagchand Gulabchand v. Bhaichand*, I. L. R. 6 Bom 193 (cf. p. 208). See also *Lakhmichand v. Kastur*, 9 Bom. H.C. 60.

There has also been some discussion on the question, whether sec. 50 of the Registration Act of 1877 is retrospective, or in other words, whether it gives all registered documents of the kinds mentioned in clauses (A), (B), (C) and (D) and (A) and (B) of secs. 17 and 18 of that Act, no matter when executed, precedence over all unregistered documents as defined in the explanation to the section. Though there are some decisions which may be quoted in support of a different view (g) the better opinion would appear to be that the section is not retrospective (h). As said by *Westropp, C.J.*, in the case of *Ichharam Kalidas v. Govindram Bhowanishankar* (i), "This construction of sec. 50 is in unison with what we believe to be one of the safest rules for the interpretation of statutes, viz., that the Legislature, while possessing the power to divest existing rights, is not to be understood as intending to exercise that power retrospectively to any greater extent than the express terms of, or necessary implication from, its language, requires."

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(g) *Ram Baran Rai v. Murli Pandey*, I. L. R. 3 All. 505; *Sri Ram v. Bhagirath Lal*, I. L. R. 4 All. 227 (F.B.), (cf. the judgment of *Stuart, C.J.*); *Habib-ullah v. Nakched Rai*, I. L. R. 5 All. 447 (F.B.) (cf. p. 451); *Dori Lal v. Umed Singh*, I. L. R. 6 All. 164 (per *Stuart, C.J.*); *Muthanna v. Alibeg*, I. L. R. 6 Mad. 174; *Raju Balu v. Krishnarav Ramchandra*, I. L. R. 2 Bom. 273. It is to be observed, however, that this latter was a case under sec. 49 and not sec. 50 of the Act. Compare also *Oghra Singh v. Ablakhi Kooer*, I. L. R. 4 Calc. 536, which seems to assume that it was only sec. 6 of Act I of 1868 which prevented sec. 50 of Act III of 1877 being applicable to the case.

(h) *Sri Ram v. Bhagirath Lal*, I. L. R. 4 All. 227 (F.B.); *Dori Lal v. Umed Singh*, I. L. R. 6 All. 164, (per *Straight, J.*, following the Full Bench decision); *Kanitkar v. Joshi*, I. L. R. 5 Bom. 442; *Ichharam Kalidas v. Govindram Bhowanishankar*, I. L. R. 5 Bom. 653; *Laksmandas Sarupchand v. Dasrat*, I. L. R. 6 Bom. 168 (F.B.) (192); *Rupchand Dagdusa v. Davlatrav Vithalrav*, I. L. R. 6 Bom. 495.

(i) I. L. R. 5 Bom. 653 (cf. p. 658).

Where a document is executed by a person on behalf of himself and of another whose agent he professes to be, it is sufficient if the person actually executing appear before the registering officer. The appearance of the other, for whom he executed, is not necessary (*j*). The person actually executing the deed, or *his* representative, assign, or agent duly authorised, must appear before the Registrar. When a man executes a document as agent for another, he or *his* representative, &c., must appear before the Registrar; and it is not necessary that the person by whose agent the document purports to have been executed, or the representative of such person, should appear (*k*).

An unregistered bond, though immoveable property be made by the terms of it a collateral security, is admissible in evidence in a suit to enforce the personal liability of the party who executed it. It has been so held both under Act XX of 1866 and the later Acts. Section 49 of the former Act (*l*) declared that "No instrument required by sec. 17 to be registered shall be received in evidence in any civil proceeding in any Court, or shall affect any property comprised therein" unless registered. Under that Act it was held by a Full Bench of the Calcutta High Court that all that was forbidden was the reception of the document "in evidence as a document affecting an interest in land" (*m*). And the same view was taken by the High Courts of the

(*j*) *Bissendoyal v. Schlaepfer*, 22 W. R. 68.

(*k*) *Ram Chunder Biswas, Petitioner, In the matter of*, 16 W. R. 180.

(*l*) The language of sec. 13 of Act XVI of 1864 was not so explicit as the language of this Act, but its effect was not less prejudicial to the person claiming under the instrument. See *Varada v. Krishnasami*, I. L. R. 6 Mad. 117.

(*m*) *Lachmipat Sing Dugar v. Mirza Khairat Ali*, 4 B. L. R. (F.B.) 18.

N. W. P., Madras, and Bombay (n). The language of sec. 49 of Acts VIII of 1871 and III of 1877 is the same. They enact that "No document required by sec. 17 to be registered shall affect any immoveable property comprised therein, ..... or be received as evidence of any transaction affecting such property ..... unless it has been registered." A Full Bench of the Calcutta High Court has recently applied the same method of construction to these sections as was applied to the corresponding sections of the earlier Act, and held that the words "shall be received as evidence of any transaction affecting such property" mean, shall be received as evidence of any transaction so far as it affects such property, that is land (o).

And the rule laid down by the Full Bench has lately been applied by a Division Bench of the same Court to a case in which it was held that the purchaser of a mortgage decree, whose title, so far as it related to the mortgage lien on the property, was defective owing to want of registration of the deed by which his vendor purchased the decree from the original decree-holder, had acquired only a money decree entitling him to recover the amount of the decree without any hypothecation of any particular property (p).

In the case above referred to, the Full Bench further declared that the view which they took of the section rendered it unnecessary for them to consider the question dis-

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(n) *Seeta Kulwar v. Jugur Nath Pershad*, 4 N. W. P. (Agra), H.C. 170; *Vellaya Padyachy v. Moorthy Padyachy*, 4 Mad. H. C. 174; *Tukaram Vithoji v. Khandoji Malharji*, 6 Bom. H.C. (o.c.j.) 134; *Sangappa bin Ningappa v. Basappa bin Parappa*, 7 Bom. H.C. (a.c.j.) 1.

(o) *Ulfatunnissa v. Hosain Khan*, I. L. R. 9 Calc. 520 (F.B.). Compare also *Stri Seshathri Ayyengar v. Sankara Ayen*, 7 Mad. H.C. 296; *Guduri Jagannadham v. Rapuka Ramanna*, 7 Mad. H.C. 348; *Kattamuzi Jagappa v. Padalu Lachappa*, I. L. R. 5 Mad. 119.

(p) *Koob Lall Chowdhry v. Nityanund Singh*, I. L. R. 9 Calc. 839.

cussed in some of the cases, whether a document of this kind embodied only a single transaction or may properly be said to contain two (g). In the cases referred to by the Full Bench it was held that an unregistered bond must be divisible in its nature, and contain a personal covenant for payment of the money in addition to a mortgage of the property, before it can be received in evidence in support of a claim to enforce the money-obligation (r). Where, therefore, the document was in its terms indivisible and disclosed one transaction only, it was held that the document, being unregistered, was inadmissible in evidence to prove the money debt (s). So, again, where the suit was one for damages for breach of a contract of lease to surrender certain lands to the plaintiff for cultivation, and the measure of damages had to be estimated according to the amount of land that the defendant had failed to deliver up, the Court held that before the question could be opened up, the contract itself must be established, and as this was in the nature of a lease and recorded a transaction affecting immoveable property for a term exceeding one year, its non-registration was fatal to its production. In short it was impossible to separate the leasing of the land from the defendant's personal liability for damages, or to hold that the contract was other than one and indivisible (t).

A document which is a receipt for a portion of the consideration money for the sale of immoveable property, must be registered,—and if not registered it cannot be received in

(g) *Ulfatunnissa v. Hosain Khan*, I. L. R. 9 Calc. 520.

(r) *Krishto Lall Ghose v. Bonomalee Roy*, I. L. R. 5 Calc. 611 ; *In the matter of the petition of Sheo Dial v. Prag Dat Misr*, I. L. R. 3 All. 229 (F.B.) ; *Lachman Singh v. Kesri*, I. L. R. 4 All. 3.

(s) *Mattongeney Dossee v. Ramnarain Sadkhan*, I. L. R. 4 Calc. 83.

(t) *Martin v. Sheo Ram Lall*, I. L. R. 4 All. 232.

evidence (u). And the law was the same under Act XX of 1866 (v).

It was held in one case by a Division Bench of the High Court at Allahabad that a receipt for sums exceeding Rs. 100 in amount paid in part liquidation of a bond hypothe-cating immoveable property must be registered under Act VIII of 1871 (which for the purposes of this question is identical with Act III of 1877) in order to render it admis-sible as evidence under sec. 49 of that Act (w). But this ruling has been dissented from by the High Court at Bombay (x), as also by that at Madras (y). In delivering the judg-ment of the Court in the case of *Shidlingapa v. Chenbasapa* (z) *Sargent*, Officiating Chief Justice, made the following obser-vations: "It was contended before us that the exhibits were inadmissible, as being documents requiring to be registered under both clauses (B) and (c) of sec. 17 of the Act of 1877. With respect to clause (B) we think it would be impossible, without straining language, to say that the sum paid on account of a mortgage debt is the consideration for the limitation or extinction of so much of the interest in the land created by the mortgage bond. The use of the tech-nical term 'consideration' implies that the person him-

(u) Acts of 1871 and 1877, sec. 17. See also *Sreenath Churn Soor v. Nilkanto Dey*, 22 W. R. 309; *Valaji Isaji v. Thomas*, I. L. R. 1 Bom. 190; *Waman Ramchandra v. Dhondiba Krishnaji*, I. L. R. 4 Bom. 126 (cf. p. 137); *Ramasami v. Ramasami*, I. L. R. 5 Mad. 115.

(v) Sec. 17; *Futteh Chund Sahoo v. Leelumber Singh Doss*, 14 Moore's I. A. 129.

(w) *Dalip Singh v. Durga Prasad*, I. L. R. 1 All. 442.

(x) *Shidlingapa v. Chenbasapa*, I. L. R. 4 Bom. 235. See also *Annapa v. Ganpati*, I. L. R. 5 Bom. 181.

(y) *Venkayyar v. Venkatasubbayyar*, I. L. R. 3 Mad. 53. See also the judgment of Innes, J., in the case of *Venkatarama Naik v. Chinna-thambi Reddi*, 7 Mad. H.C. 1.

(z) I. L. R. 4 Bom. 235 (cf. p. 237).



self to whom the money is paid limits or extinguishes his interest in the land in consideration of such payment, whereas such limitation or extinction, (if there can be said to be any) as results from the payment on account of the mortgage debt is the legal consequence of such payment, and not the act of the mortgagee. It was said, however, that, at any rate, a receipt operates to limit the mortgagee's interest in the land, as contemplated by clause (b). Undoubtedly the payment reduces the sum due at the time on the mortgage, and thus modifies the account between the mortgagor and mortgagee; but it does not operate to limit or confine within narrower limits the right or interest of the mortgagee in the land which is simply to have the payment of the principal and interest secured on the mortgaged premises by some one or other of the remedies available for that purpose."

And the remarks of *Innes, J.*, in the case of *Venkatarama Naik v. Chinnathambi Reddi* (a) quoted by him in his judgment in *Venkayyar v. Venkatasubbayyar* (b) are to the same effect. "The instrument is, as it seems to me, nothing more than an acknowledgment of the payment of a debt and of the fact of certain legal incidents attaching by the act of payment, which does not operate as a consideration for anything to be done by the person receiving it..... The clause appears to me to apply to instruments of acknowledgment of payment made on account of some such act of the party receiving payment, as is necessary to effect the change desired in the rights of the respective parties; as an instrument acknowledging repayment of the amount due on a mortgage in which the legal estate having been conveyed a reconveyance becomes necessary; or an instrument acknowledging the payment of a sum of money on account of the extinction of a right of easement, in which

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(a) 7 Mad. H. C. 1 (cf. pp. 4, 5).

(b) I. L. R. 3 Mad. 53 (cf. p. 55).

some act of the party receiving the money is necessary to effect the extinction of the right residing in him. When no act of the party receiving the payment is necessary to effect the change of rights aimed at, the payment, I conceive, does not properly come within the term 'consideration.'"

So in a previous case (c), where the mortgage deed contained an acknowledgment by the mortgagor that he had received Rs. 18,000 (the consideration for the mortgage), and the mortgagee, simultaneously with the execution of the mortgage deed, gave the mortgagor a receipt acknowledging repayment of Rs. 7,000, part of the Rs. 18,000,—it was held by the High Court at Calcutta that the receipt for the payment of Rs. 7,000 did not require registration, and that it did not fall under either clause 2 or clause 3 of sec. 17 of Act XX of 1866, although it in fact reduced the charge on the land considerably.

A receipt for a payment in respect of a mortgage debt is, however, apparently only admissible in evidence without registration when it is tendered for the mere purpose of proving the fact of the payment. If it is offered for the purpose of showing that the mortgage-lien has been extinguished, it would seem to require registration inasmuch as it then falls under cl. 2 of sec. 17 of the Act of 1866, or the similar provision in the Acts of 1871 and 1877, being an instrument which purports or operates to extinguish a right, title or interest to or in immoveable property.

In consideration of a certain sum paid to the lessor, a mourussee pottah was granted, subject to a condition that if the amount were repaid by a day named, the lessee would surrender the lease and put the lessor in possession again. A question having subsequently arisen as to whether the lessor had repaid the money and been restored to possession,

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(c) *Sheikh Gugunfur Ali v. Mahomed Yuseen*, 20 W. R. 334.

he pleaded that he had repaid it and that thereupon the lessee gave him a receipt and executed an *istifanama* or instrument of surrender,—surrendering the property to him again. This *instifanama* was not registered. It was on that ground held to be inadmissible in evidence, the Court being of opinion that it was an instrument which purported or operated to extinguish and further to acknowledge the extinguishment of an interest to or in immoveable property (*d*).

So again where a document, purporting to have been passed by a mortgagee to his mortgagor and reciting the demand of the former for repayment of his mortgage money, and the compliance with that demand by the latter by means of a fresh loan upon a second mortgage of the same property, and reciting also the fact of the delivery of possession of the property by the original to the second mortgagee, and purporting in conclusion to contain a declaration by the original mortgagee that nothing remained due to him in respect of his mortgage, was offered in evidence for the purpose of showing that the original mortgage lien had become extinguished, the Bombay High Court held that the document was one which under clauses 2 and 3 of sec. 17 of Act XX of 1866, ought to have been registered, and, not being so, was inadmissible in evidence (*e*). In so far as this last case decided that the document there in question ought to have been registered under cl. 3 of sec. 17, it seems doubtful whether it can be supported if the explanation of the term “consideration” as used in the corresponding clause of sec. 17 of Act III of 1877, given by *Sargent, C.J.*,

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(*d*) *Bhyrub Chunder Dass v. Kalee Chunder Chuckerbutty*, 16 W. R. 56.

(*e*) *Mahadaji v. Vyankaji Govind*, I. L. R. 1 Bom. 197. See also *Basava v. Kalkapa*, I. L. R. 2 Bom. 489; *Ramapa v. Umanna*, I. L. R. 7 Bom. 123; and *Faki v. Khotu*, I. L. R. 4 Bom. 590, in which case, however, the document did not relate to a mortgage debt.

and *Innes, J.*, in the two cases above quoted, be accepted. Though, however, a receipt may be inadmissible for want of registration, the payments to which the receipt relates, may, it has been held, be proved, under *illustration* (E), sec. 91 of the Indian Evidence Act, by oral evidence (f).

In a suit instituted after Act VIII of 1871 came into force, and which came before the Calcutta Court exercising its original jurisdiction, it appeared that the defendant on the 29th of March 1871, in Calcutta, deposited with the plaintiff the title-deeds of certain immoveable property in Calcutta as security for the repayment of Rs. 1,200 lent to him by the plaintiff at the time the deposit was made. Some hours afterwards, the defendant, by way of further security, gave the plaintiff a promissory note for the amount of the loan and endorsed on it the following memorandum,—"For the repayment of Rs. 1,200 and the interest due thereon of the within note of hand, I hereby deposit with the plaintiff as a collateral security by way of equitable mortgage, title-deeds of my property, &c." The Court held that there was a good equitable mortgage though this memorandum was not registered,—because the equitable mortgage was complete without the memorandum, which was not a writing which the parties had made as the evidence of their contract but only a writing which was evidence of the fact from which the contract was to be inferred (g). But this case turned entirely on the special facts proved,—on the fact that there was a good equitable mortgage on the money being advanced and the title-deeds deposited, quite

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(f) *Dalip Singh v. Durga Prasad*, I. L. R. 1 All. 442; *Waman Ramchandra v. Dhondiba Krishnaji*, I. L. R. 4 Bom. 126 (cf. p. 137); *Ramapa v. Umanna*, I. L. R. 7 Bom. 123; but see the remarks of *Muttusami Ayyar, J.*, on the first of these case in *Venkayyar v. Venkatasubbayyar*, I. L. R. 3 Mad. 53 (cf. p. 56).

(g) *Kadamath Dutt v. Sham Loll Khettry*, 11 B. L. R. 405.

independently of any subsequent writing. And, as a rule, there can be no doubt that, save under very exceptional circumstances, an equitable mortgage (if of the value of Rs. 100 or upwards) should invariably be registered.

Where the title-deeds were sent to the plaintiff accompanied by a letter from the defendant stating that they were handed over "as a collateral security for the Rs. 20,000 which fall due this day,"—and the letter was not registered,—it was held that registration was necessary. *Phear, J.*, said: "I cannot separate these letters from the transaction of the deposit of the title deeds. It explains why the deeds are deposited and states that the deposit is made as a collateral security for Rs. 20,000. This is not a case in which the charge on land is implied from the deposit of the deeds themselves: neither is it a case where the charge or equitable mortgage is made expressly by parol" (*g*). This case was one falling under Act XX of 1866,—which, however, in no respect differs, as to this matter, from the more recent acts.

Again, in a case (*h*) which came before the Bombay High Court in its original jurisdiction, an equitable mortgagee by deposit of title deeds executed an assignment of all his property and of all debts due to him and all the securities therefor, to the plaintiffs. Some days after the execution of the assignment, the title deeds, which had been deposited with the mortgagee, were handed to the plaintiff in accordance with the terms of an agreement to that effect contained in the assignment. The deed of assignment was not registered. To a suit by the plaintiff, as the assignee of the equitable mortgage, for foreclosure, it was objected that the deed of assignment, not being registered, could not be received as evidence of the assign-

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(*h*) *Dwarkanath Mitter v. S. M. Sarat Kumari Dasi*, 7 B.L.R. 55.

(*i*) *Ganpat Pandurang v. Adarji Dadabhai*, I. L. R. 3 Bom 312.

ment, and that the parties to the document having adopted that mode of evidencing the transaction, no other evidence could, under sec. 91 of the Evidence Act (Act I of 1872), be given (j). It was contended on behalf of the plaintiff that this section did not apply to the present case, because the transfer of the equitable mortgage was effected independently of the document, and that being so the document created no interest in land, and therefore need not be registered; and the Calcutta case of *Kedarnath Dutt v. Shamloll Khettry* (k) (above referred to) was relied on as establishing that proposition. It was held by *Sargent, J.*, (a decision which was upheld by a Divisional Bench on appeal) that there was no doubt that this deed of assignment was the mode which the parties selected to evidence their contract; that though the deeds were afterwards delivered, yet, coming after the execution of the assignment, such delivery was merely a delivery in pursuance of the terms contained in the documents, and that the present was, therefore, quite different to the Calcutta case. That under these circumstances therefore it was quite impossible to hold that sec. 91 of the Indian Evidence Act did not preclude any other evidence of the assignment being given than the document itself, and that this being unregistered was inadmissible, and the plaintiff, therefore, must fail to prove his title to sue as assignee of the equitable mortgage.

In another case the question was whether a certain memorandum was admissible without registration. It referred to

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(j) As to the point that, when a deed compulsorily registrable is unregistered, oral evidence is inadmissible in the place of the deed, see *Shekh Ibrahim valad Shekh Ladli Miya v. Parvata valad Hari*, 8 Bom. H.C. (a. c. j.) 163; *Sambhubhai Karsandas v. Shivilaldas Sadashivdas Desai*, 1 L. R. 4 Bom. 89; and *Somu Gurukkal v. Rangammal*, 7 Mad. H.C. 13.

(k) 11 B. L. R., 405.

a promissory note for Rs. 20,000, and said, "for the above promissory note, the grant of the dockyard and office to be deposited in three days and a proper agreement made out. The time of credit to be one year or eighteen months." The Court held that this was not an actual mortgage of the dockyard or office, nor did it amount to a conveyance : that it was merely an agreement (of which specific performance might be enforced) to deposit the deeds and to execute a proper agreement : and that it was not a document purporting to create any right, title or interest whether vested or contingent in immoveable property, with- in the meaning of cl. 2, sec. 17, Act XX of 1866 (l).

So where a person borrowing money gave the lender an *ikrar*, by which he agreed to execute a conveyance of certain lands,—it was held that the document (which was executed when Act XIV of 1864 was in force) was one the registration of which was optional, and that it was admissible in evidence in a suit for specific performance of the agreement to convey (m). And an agreement for a lease, in which it was agreed that on a deed being prepared by an attorney the parties would execute it, was, in a suit for specific performance of the agreement to execute a lease, held not to require registration (n).

The defendant had given the plaintiffs a writing dated the 28th April 1874, stipulating that the deed of sale of the defendant's bungalow to the plaintiffs for Rs. 4,300, which was to have been made that day, owing to certain circumstances therein mentioned, should be made and delivered by the defendant to the plaintiffs twenty days thereafter; acknowledging the receipt by the defendant from the plaintiffs of Rs. 100 as earnest money

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(l) *Currie v. S. V. Mutu Ramen Chetty*, 3 B. L. R. 126.

(m) *Asgur Ali Shikdar v. Mothoora Nath Ghose*, 15 W. R. 354.

(n) *Bhairabnath Khettri v. Kishori Mohan Shaw*, 3 B. L. R. (append.) 1.



for the purchase of the bungalow, and concluding with certain penalties in the event of a default by either party. In a suit of the nature of a suit for specific performance brought by the plaintiffs to compel the defendant to execute the deed of sale to the plaintiffs as promised in the writing of the 28th April 1874, the Bombay High Court held that the writing required registration under Act VIII of 1871, sec. 17, not merely under clause (3) of that section as it distinctly acknowledged the receipt of Rs. 100 as part of the consideration for sale of the house to the plaintiffs, but also under clause (2) as it operated to create an interest in the house of the value of Rs. 100 and upwards. The very foundation of a claim, like that of the plaintiffs for specific performance, is that the contract between the parties did presently operate as a sale of the property. If it did so operate, the contract required registration. If it did not so operate, the plaintiffs had no case (o). But in a later case in which the plaintiffs sued for specific performance of an agreement in writing which acknowledged the receipt of Rs. 100 as earnest, and provided that the remainder of the purchase money (Rs. 1,800), should be paid one month from the date of the agreement when the deed of conveyance of the property should be executed, it was held by *West, J.*, that the agreement, although unregistered, was admissible in evidence under clause (H) of sec. 17 of Act III of 1877. Being unregistered it could not create or assign the interest intended by the parties to be transferred, and being thus incapable of carrying out the primary intention of the parties, the agreement became one "merely creating a right to obtain another document which would when

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(o) *Valaji Isaji v. Thomas*, I. L. R. 1 Bom. 190 ; see also the remarks on this case in *Waman Ramchandra v. Dhondiba Krishnaji*, I. L. R. 4 Bom. 126 (F.B) (cf. p. 139).

executed" effect the desired purpose if the execution were accompanied with registration. The right given by the agreement was merely a right *in personam*, and the agreement was admissible in evidence to show the contract entered into for another conveyance, though not as a conveyance itself (*p*).

And this decision by *West, J.*, has been followed in more recent cases. An agreement or "bargain-paper" in writing, for the sale of a house acknowledged the receipt of Rs. 1,000 from the purchaser as earnest money, and declared that the vendors were duly to make out a good title to the house, and get approved by the purchaser's solicitors, "as being of good title," a deed of sale thereof, prepared according to law, within two months, and to deliver the same; that on the execution of such deed and delivery of possession of the house to the plaintiff, the balance of the purchase money was to be paid; and that in case a good title to the house could not be made out, the bargain-paper was to be null and the earnest money was then to be returned to the purchaser with interest. In a suit for specific performance of the agreement, *Birdwood, J.*, sitting on the Original Side of the Bombay High Court, reviewed all the previous cases, and held, following the decision of *West, J.*, in *Burjorji Cursetji Panthaki v. Muncherji Kuverji* (*q*) that the document was admissible in evidence, though unregistered, as coming within the provisions of cl. (H) of sec. 17 of the Registration Act (III of 1877) (*r*). And in a very recent case decided by a Division Bench of the Calcutta High Court the construc-

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(*p*) *Burjorji Cursetji Panthaki v. Muncherji Kuverji*, I. L. R. 5 Bom. 143

(*q*) I. L. R. 5 Bom. 143.

(*r*) *Chunilal Panalal v. Bomanji Mancherji Modi*, I. L. R. 7 Bom. 310; compare also the ruling of *Wilson, J.* in *Sreegopal Mullick v. Ram Churn Nuskur*, I. L. R. 8 Calc. 856 (of. 858).

tion put on the section by *West, J.*, in the case above referred to was adopted, and it was held that an unregistered document in the form of an agreement to mortgage, which may amount to what is called an equitable mortgage, though inadmissible in evidence under cl. (B) of sec. 17 of the Registration Act, if used as an equitable mortgage, may nevertheless be used as an agreement to execute a mortgage under the provisions of cl. (H) of the same section (s).

In a case, however, which came before the High Court at Madras, it was held (t) that a letter, stating an agreement between the parties for the sale of certain land, acknowledging the receipt of Rs. 500 of the purchase money and declaring that the vendor was only entitled to receive the balance after executing the sale deed within a certain date, and that he had no connection whatever with the land, not being registered, was not admissible in proof of the agreement to convey. The letter was an instrument acknowledging the payment of consideration on account of the creation of an interest in immoveable property of over Rs. 100 in value (sec. 17 of Act III of 1877) and as it of itself declared a right, title and interest in the purchaser which had passed to him from the vendor, it did not appear to be within the exception of cl. (H). Though the document also intimated that a sale deed was to be executed, it could not be said that of itself it merely created a right to obtain that conveyance. With regard to the ruling in this case that the letter "declared" a right, title and interest in the defendant, it may be observed that the letter apparently contained merely an admission of the agreement to convey, and was not the agreement itself. If so it seems doubtful whether it could be held to "declare"

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(s) *The Bengal Banking Corporation v. Mackertich*, I. L. R. 10 Cal. 315.

(t) *Ramasami v. Ramasami*, I. L. R. 5 Mad. 115.

a right within the meaning of that term as used in cl. (B) of sec. 17 of Act III of 1877 (u).

The Registrar cannot refuse to register a deed on the ground that the full consideration therein mentioned has not been paid. His duty is, when the parties appear before him, simply to ascertain whether the deed has been executed by the persons by whom it purports to have been executed (v). When the executants appear and admit execution, the Registrar has nothing to do with the recitals in the deed, or the possible operation of the deed as regards third parties: and it is his plain duty to register the document, whether the executant asks or consents to it or not (w). The registration of a document under Act XX of 1866 is complete when all the requirements of secs. 66—69 have been fulfilled: and the certificate mentioned in sec. 68 is *prima facie* evidence of its completeness. Where therefore a document bore the certificate required by sec. 68 of Act XX of 1866 showing that it had been registered, it was held that, notwithstanding it had been presented for registration by the agent of the person executing it under a power of attorney not recognisable under that Act for the purposes of sec. 34, it must be treated as a registered document (x). And where a *kubala* or deed of sale bore such a certificate, a memo-

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(u) *Sakharam Krishnaji v. Madan Krishnaji*, I. L. R. 5 Bom. 232.

(v) *Brindabun Chandra Shaw, In the matter of*, 1 B. L. R. (o. c. j.) 47.

(w) *Obhoy Churn Mohapattur v. Shunker Dobey*, 12 W. R. 500; *Ram Chunder Biswas, Petitioner, In the matter of*, 16 W. R. 180; *Mojon Mollo v. Dula Gazi Kulan*, 12 B. L. R. 492 (note). See also the remarks of some of the Judges in *In the matter of the Petition of Bishmath*, I. L. R. 1 All. 318 (F.B.)

(x) *Ikbal Begam v. Sham Sundar*, I. L. R. 4 All 384; see also *Sah Mukhun Lall Panday v. Sah Koondun Lall*, 15 B. L. R. 228, S.C. L. R. 2 I. A. 210, and 24 W. R. 75.

random indorsed by the Registrar to the effect that he was not satisfied that the heirship of the party conveying had been established, was held in no way to affect the registration (y).

The provisions of the latter Acts are substantially similar (z). But whereas under the older law the Registrar's "certificate" is "*prima facie* evidence that the document has been duly registered, &c.," under the two later Acts (a), it is merely "admissible for the purpose of proving that the document has been duly registered, &c." It has been held, however, that these words do not empower a Court to go behind the certificate of the registering officer, and enquire whether he has strictly conformed to all the provisions of the Act. When a document, which purports to have been registered, is tendered in evidence, the Court cannot reject it for non-compliance with the registration law (b).

An instrument of sale was executed on the 9th of August 1866, and was shortly afterwards accidentally destroyed by fire,—all save a charred fragment—of which, on account of the damage which the document had received, registration was refused, when it was (within the prescribed time) presented for registration. A suit was then brought to compel the vendor to execute a fresh instrument of sale: and the question arose whether secondary evidence of the contents of the burnt document was admissible. The Madras Court held that it was, observing,—“An instrument liable to

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(y) *Mussamut Rohimoonissa v. Shaikh Abdoolah Khan*, 22 W. R. 319; *Mutukdharee Lal v. Shaikh Fuzul Hossein*, 6 W. R. (Misc.) 131.

(z) Sec. 60.

(a) Act III of 1877, sec. 60, &c.

(b) *Sheo Shunkur Sahoy v. Hirdey Narain Sahu*, I. L. R. 6 Calc. 25; *Har Sahai v. Chunni Kuar*, I. L. R. 4 All. 14; see also the remarks of the Privy Council in *Muhammad Ewas v. Birj Lal*, I. L. R. 1 All. 465 (cf. pp. 473 *et seq.*).

registration under sec. 17 and which through neglect had not been presented for registration within the time allowed, would clearly, after such time had elapsed, be inadmissible, and consequently if lost or destroyed subsequently it could not be proved by secondary evidence. But in the present case the accident to the instrument rendered it, through no default of the plaintiff, incapable of registration within the time allowed by sec. 22, and thus prevented the plaintiff registering it in accordance with the provisions of the Act. There never had been the omission in respect to the registering of the instrument, to which the section, in our view of its construction, attaches the prohibition, and consequently it had not become an inadmissible instrument within the meaning of the section" (c).

The question whether an instrument is of such a nature as to require registration is sometimes one of considerable difficulty.

Certain immoveable property having been attached in the execution of a decree held by *S*, *B* and *L* objected to the attachment. An arrangement was subsequently effected between the objectors and the parties to the decree which resulted in all parties jointly filing a "*Sulehnama*" (or deed of compromise) in Court, in which *B* and *L*, who had purchased the rights of the judgment-debtor in the attached property, agreed to pay the amount of the decree, which exceeded Rs. 100, within one year, and hypothecated such property as security for the payment of such amount. *S* having sued upon this document claiming to recover the amount of the decree by the sale of the property, it was held by the Allahabad High Court that the document not having been registered the suit was not maintainable. The "*Sulehnama*" amounted to a mortgage

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(c) *Nynakka Routhen v. Vavana Mahomed Naina Routhen*, 5 Mad. H. C. 123.

deed, inasmuch as by it *B* and *L* obliged themselves to pay money to the plaintiff, and it evidenced a pledge of the property for securing the payment of the money (*d*).

In another case, the same Court decided, that a letter, in which a mortgagee referred in terms to a proposal made by his mortgagor to substitute certain other property for certain of the property covered by the mortgage bond, and accepted that proposal, must be considered to be an instrument "purporting to extinguish a contingent interest to and in immoveable property" within the meaning of sec. 17 of Act III of 1877, and, therefore, that, being unregistered, it was not admissible in evidence to prove that a substitution of properties had been agreed to by the mortgagee (*e*).

The same Court has held that an endorsement by a Judge on a deed of mortgage, to the effect that the deed had been purchased by certain persons at a public sale held under special orders passed by the Court in a certain case, required registration under sec. 17 of the Registration Act of 1871 (*f*).

The Bombay High Court has ruled that an assignment for valuable consideration of a decree, obtained by a mortgagee against his mortgagors for the payment of the mortgage moneys and in default for the sale of the mortgaged properties, is a document of which the registration is compulsory under Act VIII of 1871 (*g*).

It has been decided by the Madras High Court, that a Hindu widow's right to maintenance does not, so long as it has not been made a specific charge on a particular property, constitute an interest, vested or contingent, in the immoveable property of the family within the mean-

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(*d*) *Surju Prasad v. Bhawani Sahai*, I. L. R. 2 All. 481.

(*e*) *Safdar Ali Khan v. Lachman Das*, I. L. R. 2 All. 554.

(*f*) *Kanahia Lal v. Kali Din*, I. L. R. 2 All. 392.

(*g*) *Gopal Narayan v. Trimbuk Sadashiv*, I. L. R. 1 Bom. 267.



ing of the Registration Act (Act XX of 1866) and a release thereof did not require to be registered under clause 2, sec. 17 of that Act (*h*). As Act XX of 1866 differs in no respect, so far as this matter is concerned, from the more recent Acts, this decision would appear to be applicable also to cases falling under them.

It would seem that a deed of assignment of a mortgage for a consideration of less than Rs. 100 does not require registration, even though the consideration for the mortgage itself may have been Rs 100 or upwards. It is the value at which the parties to the assignment fixed the interest assigned which must be looked to for the purpose of deciding whether the instrument requires registration (*i*).

There has been some variety of decision on the question as to how the value of the right, title or interest created by a mortgage is to be estimated for the purpose of registration.

It was formerly held by a majority of a Full Bench of the Allahabad High Court (*Sir Robert Stuart*, C.J., dissenting) that the value should be estimated by the amount secured for certain by the mortgage (*j*). In that case the obligor of a bond bearing date the 20th January 1873 agreed to pay the obligee Rs. 80, together with interest on that amount at the rate of Rs. 2 per cent. per month in the month of Baisakh, Sambat 1930 (corresponding with the period between the 2nd April 1874 and the 1st May 1874), and hypothecated immoveable property as collateral security for such payment. On the 15th February 1879 the obligee sued the obligor on the bond to recover Rs. 196-8, being the principal amount and interest, from the hypothecated property. The majority of the Full Bench held that as the

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(*h*) *Kalpagathachi v. Ganapathi Pillai*, I. L. R. 3 Mad. 184.

(*i*) *Satra Kumaji v. Visram Hasgavda*, I. L. R. 2 Bom. 97.

(*j*) *Himmat Singh v. Sewa Ram*, I. L. R. 3 All. 157 ; followed in *Nabira Rai v. Achampat Rai*, I. L. R. 3 All. 422.

amount secured for certain by the hypothecation (that is apparently the amount payable by the obligor in the month of Baisakh, Sambat 1930) exceeded Rs. 100, the registration of the bond was obligatory. This ruling was in accordance with a number of previous decisions by the same Court (*k*).

But the High Court of Bombay distinctly expressed its dissent from the doctrine affirmed by the Allahabad Court in the Full Bench decision above referred to. In the case (*l*) before the Bombay High Court, the mortgage was for a sum of Rs. 95, with interest at Rs. 1-9 per cent. per mensem and not redeemable for five years from the date of its execution. On behalf of the defendants it was contended that the right, title and interest created by this mortgage exceeded Rs. 100 in value, and, therefore, that the mortgage, according to Act XX of 1866, sec. 17, clause 2, required registration, and the case of *Darshan Singh v. Hanwanta* (*m*) (one of the decisions of the Allahabad High Court) was cited in support of this contention.

The judgment of the Court was delivered by *Westropp*, C.J., who said:—"The registration value was there" (in the Allahabad case) "gauged, not by what the mortgagor received from the mortgagee as consideration for granting the alleged mortgage, but by what the Court regarded as the minimum

(*k*) See *Baboo Dhurmdao Narain Singh v. Baboo Nund Lall Singh*, 6 N. W. P. (All.) H. C. 257; and *Banno v. Pir Muhammad*, I. L. R. 2 All. 688, which were cases decided under Act XX of 1866. See also *Darshan Singh v. Hanwanta*, I. L. R. 1 All. 274; *Rajpati Singh v. Ram Sukhi Kuar*, I. L. R. 2 All. 40; *Karan Singh v. Ram Lal*, I. L. R. 2 All. 96; *Ahmad Bakhsh v. Gobindi*, I. L. R. 2 All. 216; *Basanti Lal v. Tapeswari Rai*, I. L. R. 3 All. 1, which were cases decided under Act VIII of 1871.

(*l*) *Nana bin Lakshman v. Anant Babaji*, I. L. R. 2 Bom. 353; See also *Satra Kumaji v. Visram Hasgavda*, I. L. R. 2 Bom. 97.

(*m*) I. L. R. 1 All. 274.

sum which the mortgagee could have recovered under it. In this Court, however, in considering whether a mortgage is of the value of Rs. 100 or upwards, the value of 'the right, title or interest,' created by the mortgage has always been estimated by *the amount of the principal money thereby secured*; that being assumed to be the sum received by the mortgagor as consideration for making the grant by way of mortgage, or, so to speak, the purchase-money of the mortgage. When it is necessary to determine whether an instrument, other than a deed of gift, purports or operates to create, &c., any right, title, or interest, of the value of Rs. 100 or upwards, to or in immoveable property, the test of value which we adopt is the consideration stated in the instrument, whether it be one of sale or of mortgage, to be given to the grantor, and not either the minimum, or maximum, or other benefit which may result from the transaction to the grantee, whether he be vendee or mortgagee. \* \* \* If the necessity for registration of a mortgage is to be ascertained, not by the consideration given by the mortgagee for it, but by the actual value of the transaction to the mortgagee, the test would, at the time of making the contract and when the parties would most need to know whether the mortgage must be registered, be wholly impracticable if the interest or profits in lieu of interest, receivable by the mortgagee is to form one of the elements of value. The rate of interest might, of course, and usually would be then fixed, but the amount of it could only be known when the mortgage was redeemed or foreclosed. The time of redemption or foreclosure would depend on the pleasure or convenience of the parties or of one of them. Why should the first three or six months' interest, merely because it is specially noticed in the mortgage, be taken into account more than any subsequent interest receivable by the mortgagee? If the mortgagee be not entitled to interest under the mortgage,

and the stipulation be that, in lieu thereof, he is to enter into occupation of the land and to cultivate it, and retain the profits arising from the cultivation, how, at the date of the contract, could the actual value of the mortgage to the mortgagee be ascertained? These are amongst the grounds upon which rests the practice, which has uniformly prevailed here, of estimating the value of a mortgage as well under Act XVI of 1864, Act XX of 1866, and Act VIII of 1871 by the amount of the principal money lent, and without any regard to the duration of the relation of mortgagor and mortgagee, or to the rate or continuance of the interest payable. Had we put a different construction on sec. 13 of Act XVI of 1864, sec. 17 of Act XX of 1866, or sec. 17 of Act VIII of 1871, we should, we think, have converted those enactments into so many traps for the unwary, which could not have been the intention of the Indian Legislature. The words 'or in future' which occur in the two last mentioned enactments, have reference, as we think, to estates in remainder or in reversion in immoveable property, or to estates otherwise deferred in enjoyment, and not to interest payable in future on principal moneys lent on the security of immoveable property."

And another Full Bench of the Allahabad Court has recently reconsidered the ruling in *Himmat Singh v. Sewa Ram* (n), and, accepting the principles laid down by the Bombay Court in the case above referred to, held (*Straight and Oldfield*, JJ., dissenting) that the principal sum secured by a mortgage of immoveable property is alone to be considered for the purpose of deciding whether the registration of the instrument of mortgage is optional or compulsory under the Registration Act 1877 (o).

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(n) I. L. R. 3 All. 157.

(o) *Habib-ullah v. Nakched Rai*, I. L. R. 5 All. 447 (F.B.); and

The point has also come several times recently before the Madras High Court. In one case (p) the mortgage bond was for Rs. 95, which the mortgagors agreed to pay, partly in the shape of grain and partly in cash, within a certain date, and in default to pay an increased quantity of grain and interest on the cash at the rate of  $2\frac{1}{4}$  per cent. per month. The mortgagors failed to discharge the debt within the time fixed. In a suit by the mortgagee to recover the amount due on the mortgage bond, which amounted at the time of suit to Rs. 344-12, it was pleaded by one of the defendants that the mortgage bond was invalid, not having been registered. *Morgan, C.J.*, in delivering judgment, expressed himself as follows: "In the case of the Stamp laws both in England and here it is settled that it is the *sum itself* and not interest, accretions, and so forth, 'that must guide the sum actually due at the time of taking the security, and not any sum to become due in future for the use of the money.' *Pruessing v. Ing* (q). This is the convenient rule and the language of the Stamp Acts makes it clear. The Registration Act may by its terms cause more difficulty. The words '*present or future*,' '*vested or contingent*,' to my mind, point, not to the *value* or its ascertainment, but to the right or interest in the land which is to be created as a security. The security may be one that will arise in future. The person giving it may have in the land no present vested right. If the charge or interest created is of a value less than Rs. 100 registration is needless. No doubt in many cases, as in this case, the land cannot be freed and restored to the proprietor until various increments and the principal sums are paid; but for registration purposes a future contingent

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compare the provisions of sec. 59 of the Transfer of Property Act, 1882, which do not, however, apply to mortgage instruments entered into before the 1st July 1882.

(p) *Narasayya Chetti v. Guruwappa Chetti*, I. L. R. 1 Mad. 378.

(q) 4 B. and Ald. 204.

value is useless. The act of registering must be done at once, but it is impossible beforehand to say what charge may ultimately have to be borne. The value of the present interest should determine. We might, perhaps, distinguish the decisions, but, if possible, it is more convenient in such a matter to have a broad rule."

And *Kindersley*, J., said: "I agree with the Chief Justice. In the case of *Subramania Pillai v. Kunji Kone* (r), the sum of Rs. 99 was made payable one year after date, with interest, which would raise the total sum payable at the time appointed to more than Rs. 100. In the present case the value secured payable at the periods appointed does not amount to Rs. 100, but in default of payment a fine in grain and interest become payable at certain rates. The amount of such fine would depend on the amount of the crop, and it was impossible at the time of execution to say how much, if anything, would become due on this account or on account of interest. I, therefore, agree that those uncertain amounts ought not to be considered in calculating, for the purposes of the Registration Act, the amount secured by the instrument."

In another case (s), which was tried by *Sir Chas. Turner*, C.J., and *Kindersley*, J., the question was as to the necessity for registering a bond hypothecating inmoveable property to secure the repayment of Rs. 95-14 with interest at 18 per cent. per annum, the principal to be paid in four annual instalments, three of Rs. 23-5-4, and the fourth of Rs. 25-14, and the whole of the interest to be paid on the date of the last instalment, without any provision that the debtor should be at liberty to anticipate the payment of any

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(r) S. A. No. 432 of 1877, not reported.

(s) *Kattamuri Jagappa v. Padalu Latchappa*, I. L. R. 5 Mad. 119; followed in *Tiyagaraja Padyachi v. Ramanujam Pillai*, I. L. R. 6 Mad. 422.

instalment. The Court held that registration was compulsory, inasmuch as the lowest sum which the debtor could compel the creditor to accept was in excess of Rs. 100.

The Court said : " We hold that the Judge has adopted the proper test in determining the value of the interest created by the mortgage, namely, the amount of the least sum recoverable. The Registration Act (VIII of 1871) made the registration compulsory of instruments which purport or operate to create any interest in immoveable property of the value of Rs. 100. It is the value of the interest created, not the consideration for the creation of the interest which must be regarded, cases may readily be suggested, in which the consideration falls far below the value of the interest created. The object of the registration law is to prohibit concealed conveyances which may deteriorate in any considerable degree from the value of the property : it is immaterial whether such interests have been created for an adequate consideration or for any consideration."

In this case the Court apparently adopted the earlier view of the Allahabad Court in preference to that of the High Court at Bombay. But in a later case (*t*), in which the judgment was delivered by *Innes, J.*, that learned Judge, after noticing the rule which had been laid down by a Full Bench in a recent reference, namely that, when the terms of a deed left it open to the mortgagor to discharge an encumbrance, of which the principal sum amounted to Rs. 92 only, at any time he thought fit before the day named, the deed did not necessarily create an interest in land of the value of Rs. 100 ; and after observing that this view, if applied to the present case, would class the document as one not compulsorily registerable, made the following observations : " I am inclined to concur in the view taken by the Bombay High Court in *Nana bin*

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(*t*) *Sadagopayyangar v. Dorasami Sastri*, I. L. R. 5 Mad. 214



*Lakshman v. Anant Babaji* (u) which seems to have been in accordance with the view of the Calcutta High Court, *Rohinee Debia v. Shib Chunder Chatterjee* (v), upon the similar provisions of the earlier Act of 1864 (w), and of the late Chief Justice and Mr. Justice Kindersley, in *Narasayya Chetti v. Guruvappa Chetti* (x). I agree in the opinions of the learned Judges in that case. A rule which may necessitate a calculation of a value dependent on contingencies and often not readily ascertainable at the time of registration, is so inconvenient that it can scarcely be supposed that the Legislature could have had it in contemplation. As expressed by the late Chief Justice in that case, I think 'the value of the present interest should always determine' the amount for registration purposes, and, as the balance of authority preponderates on the side of the opinion of the High Court of Bombay, I would reverse the decree of the Subordinate Judge."

In a case which came before a Division Bench of the Calcutta High Court, consisting of *Ainslie* and *White, JJ.*, the Court held that a deed, purporting to secure the sum of Rs. 95 advanced on certain properties, giving the lender possession for a fixed period at a yearly rent of Rs. 8-12, Rs. 6-12 out of such rent being retainable by the lessee as interest on the sum advanced, did not require registration (y). The Court did not, however, fix the principle on which such cases were

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(u) I. L. R. 2 Bom. 353.

(v) 15 W. R. 558.

(w) *Quære* 1866? This Act appears from the judgment to have been the one applicable to the case.

(x) I. L. R. 1 Mad. 378 (cf. p. 380).

(y) *Ram Doolary Koor v. Thacoor Roy*, I. L. R. 4 Calc. 61; followed in *Korban Ally Mirdha v. Sharoda Proshad Aich*, I. L. R. 10 Calc. 82. See also *Ishan Chandra v. Socjan Bibee*, 7 B. L. R. 14; S.C. 15 W. R. 331; and *Rohinee Debia v. Shib Chunder Chatterjee*, 15 W. R. 558.

to be decided. *Ainslie*, J., apparently based his decision partly on the rule laid down by the Allahabad Court in the case of *Darshan Singh v. Hanwanta* (z), that the least amount that could be recovered under the instrument was the amount to be considered, partly on the authority of the Calcutta case of *Ishan Chandra v. Soojan Bibee* (a), where it was held that an instrument though in form a *zurpeshgi* lease for six years was really a mortgage to secure repayment of the sum of Rs. 99, and as such created an interest of a value less than Rs. 100, and partly on a rule which he deduced from a Bombay case (b), viz., that a favorable construction should be put on the Registration Act in any case of doubt in order to give effect to the instrument. *White*, J., though having no doubt that, in the present case, the value of the property was below Rs. 100, had grave doubt as to the proper mode of estimating the value of the interest in the property in dispute. He said: "The Legislature has laid down no rule in the Registration Act to guide us in coming to a conclusion as to how an interest of this sort in land is to be valued, or how such an interest is to be estimated in money. Looking to the natural sense of the language used by the Registration Act, I should say that the value of the interest in the present case is what the possession of the property rent-free for four years is worth to the defendant. The parties have fixed the amount of rent which will thus come into the pocket of the defendant under the instrument at Rs. 6-12 per annum. The entire value thereof of four years' possession would be Rs. 27, and the document would not require to be registered. On the principal recognized in the Bombay case cited by my brother *Ainslie*, I think the contingent circumstance that the

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(z) I. L. R. 1 All. 274.

(a) 7 B. L. R. 14; S. C. 15 W. R. 331.

(b) *Moro Vithal v. Tukaram valad Malharji*, 5 Bom. H.C. (a. c. j.) 92.

defendant may continue to hold the land for more than four years unless the Rs. 95 is then paid off, ought not to be taken into account in deciding what is the value of the interest for the purpose of registration. I feel some difficulty in treating the Rs. 95 as the value of the interest in the land in this case, when the Registration Act has laid down no rule on the subject, but left the Court to ascertain that value as best it may. If we are at liberty to look at the Stamp Act, and apply the rule there given for fixing the value of a usufructory mortgage when possession is taken, there would be reason for holding Rs. 95 to be the value of the interest created by the present document. But I am not sure that we may look at the Stamp Act in solving the question before us." This proposal to value the interest by "what the possession of the property rent-free for four years was worth to the defendant" is one which has not been followed in any other case. Its correctness may therefore well be questioned.

It has been held by a Full Bench of the Bombay High Court that the reason for the exception made by sec. 48 of the Registration Act (VIII of 1871) in favour of an oral agreement accompanied by possession, is, that, by such possession, the parties who rely on a subsequent registered deed had, or might, if they had been reasonably vigilant, have had, previously to their entering into their contract with their vendor and to their taking a conveyance, notice by the fact of such possession that there was some prior claim to the property. Therefore where there is actual notice of a prior oral agreement, although unaccompanied by possession, the object of the Legislature is fully attained (c).

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(c) *Waman Ramchandra v. Dhondiba Krishnaji*, I. L. R. 4 Bom. 126 (F.B.) (cf. p. 152). See also *Solano v. Lala Ram Lal*, 7 C. L. R. 481, and *Chunder Nath Roy v. Bhoynub Chunder Surma Roy*, I. L. R. 10 Calc. 250.

But in the case of *Fuzludeen Khan v. Fakir Mahomed Khan (d) Pontifex, J.*, expressed an opinion that the insertion of the words relating to possession in sec. 48 appeared to him to have been merely intended as a declaration of the law limiting the operation of oral alienations. It was in effect equivalent to saying that, although the Registration Acts are not intended to interfere with oral alienations, which, from the nature of the case, cannot be registered, yet the only oral alienations of which the law can take notice, in competition with registered instruments, are those which are properly established by evidence of possession. Unless the oral alienee was in possession, the Courts would now be excluded from considering any equity which he might have against a subsequent alienee by registered deed.

It has been held by the High Court of the N. W. P. that an unregistered deed, creating an interest in immoveable property exceeding Rs. 100 in value executed before Act XVI of 1864 was passed, was not liable to the consequences which by sec. 13 of that Act followed from non-registration, on the principle that "enactments are generally to be read as regulating the future conduct and transactions of persons, unless there is a clear and manifest intention that the law should operate retrospectively on past transactions" (e). The principle of this case has been extended by a later decision of the same Court to a case in which the competing deeds were both optionally registrable, it being ruled that sec. 50 of Act XX of 1866 did not entitle a sale deed optionally registrable, and registered under that Act, to priority over

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(d) I. L. R. 5 Calc. 336 (cf. p. 346). But see the remarks of *Garth, C.J.*, in *Chunder Nath Roy v. Bhoyrub Chunder Surma Roy*, I. L. R. 10 Calc. 250 (cf. p. 252) as to the expressions used by *Pontifex, J.*, in his judgment in this case.

(e) *Chuterdharee Misser v. Nursingh Dutt Sookool*, 3 N.W.P. (Agra) H. C. 371. See also *Chattar Singh v. Ram Lal*, I. L. R. 3 All. 488.

two deeds of mortgage executed in 1853, and being of the nature of instruments of which under sec. 18 of that Act the registration was optional (*f*).

In Bombay it has been held that a mortgage deed registered under Act XX of 1866 is not thereby entitled to priority over a mortgage deed which might have been but was not registered under Act XIX of 1843, in cases where the consideration for the rival deed exceeds Rs. 100. The Court, however, expressly stated that it offered no opinion as to what the effect of sec. 50 of Act XX of 1866 would be under similar circumstances in the case of instruments executed for a consideration under Rs. 100 (*g*).

The terms of secs. 17 and 50 of the Act of 1877 show that sec. 50 of that Act does not operate so as to exclude, on the ground of their non-registration, instruments executed before Act XVI of 1864 came into operation (*h*), and the terms of sec. 50 of Act VIII of 1871 would seem to warrant a like ruling in the case of documents to which that Act is applicable.

It has also been ruled that neither sec. 17 of Act III of 1877, nor the similar sections of the preceding Acts have the effect of rendering a document, which was not compulsorily registrable under Act XVI of 1864 inadmissible in evidence, without registration under those Acts (*i*).

It has been noticed by the High Court at Bombay that

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(*f*) *Sheodyal Aheer v. Ghool Mahomed Khan*, 2 N.W.P. (All.) H.C. 296.

(*g*) *Khandu Dulabdas v. Tarachand Amarchand*, I. L. R. 1 Bom. 574; followed in *Parmaya v. Sonde Shrinivasappa*, I. L. R. 4 Bom. 459. See also *Venkatanarsammah v. Ramiah*, I. L. R. 2 Mad. 108.

(*h*) *Tirumala v. Lakshmi*, I. L. R. 2 Mad. 147. See also *Ram Baran Rai v. Murli Pandey*, I. L. R. 3 All. 505; but, *quære*, was Act III of 1879 applicable to this case? See the Full Bench decision in *Sri Ram v. Bhagirath Lal*, I. L. R. 4 All. 227.

(*i*) *Ram Coomar Singh v. Kishari*, I. L. R. 9 Calc. 68.

there is no provision in the Registration Act of 1871 for registering a contract when it is contained in more writings than one, like those to be found in the Indian Stamp Acts, or in the English Registration Act. The Court in the same case expressed a doubt whether ordinary letters in a negotiation for a purchase of immoveable property were intended to be comprised within the scope of the term "instrument" as used in that Act (*j*). The Madras High Court does not, however, appear to share this doubt, as it has held that a letter acknowledging payment of consideration on account of the creation of an interest in land, being unregistered, was inadmissible under Act III of 1877, which does not differ in any respect, so far as this point is concerned from the Act of 1871 (*k*).

It was held in one case, in which the question was whether the words used in a bond gave a lien upon immoveable property, that the fact that the bond had been recorded in book "four" of the books required to be kept by the Act, in which book are to be entered documents which do not relate to immoveable property, and not in book "one," in which are to be recorded documents which do relate to such property, showed that it was not the intention of the parties that the immoveable property of the debtor should be charged (*l*).

The Bombay High Court has held that the Court is bound in regular appeal to entertain an objection that a document is invalid under sec. 49 of Act VIII of 1871 for want of registration, even though no objection may have been raised to its admissibility in the Court below (*m*). And the

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(*j*) *Waman Ramchunder v. Dhondiba Krishnaji*, I. L. R. 4 Bom. 126 (F. B.) (cf. p. 139).

(*k*) *Ramasami v. Ramasami*, I. L. R. 5 Mad. 115.

(*l*) *Najibulla Mulla v. Nusir Mistri*, I. L. R. 7 Calc. 196.

(*m*) *Basawa v. Kalkapa*, I. L. R. 2 Bom. 489.

Allahabad High Court would seem to incline towards the same view (n).

Where a decree has been made, declaring the validity of a mortgage and directing a sale of the mortgaged property the judgment-debtor cannot resist the issue of execution on the ground that the mortgage deed on which the decree is based was not registered as required by law (o).

The Acts of 1866 and 1864 contained provisions (which are omitted from the later Acts) for the "special" registration of obligations for the payment of money. The general effect of these provisions may be stated to be that when the parties at the time of registering agreed, and got the Registrar to record the agreement, that the amount secured might be recovered in a summary way, the obligee could at any time within one year from the date on which the amount became payable apply by petition to a Civil Court having jurisdiction,—and thereupon on production of the obligation and of the Registrar's record of the agreement that the obligation might be enforced summarily, was entitled to a decree for the amount due and claimed, with interest at the rate specified (if any) to the date of the decree.

It is not necessary to enter here into the details of the law as to "special" registration and summary proceedings taken thereon. It is enough to indicate their bearing on questions connected with mortgages created by such instruments.

The Court in giving a decree, under a bond specially registered, cannot vary the terms of the agreement between the parties, or give any decree whatever other than that which it is by the strict words of the law autho-

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(n) *Safdar Ali Khan v. Lachman Das*, I. L. R. 2 All. 554 (cf. p. 559).

(o) *Jugjeebun Goopto v. Goluck Monee Debia*, 22 W. R. 354. See also *Jeetoo Mathoon v. Gopaul Dass*, S. D. A. 1857, p. 147.



rised to give. Thus where the obligation was for the payment of a certain sum on a day named, the Court could not give a decree ordering payment by instalments (*p*).

In like manner, under a "specially" registered bond purporting to mortgage land as a security for the repayment of money, only a money decree can (under sec. 53 of Act XX of 1866) be passed: and the Court has no power to declare that the debt is a charge on the land (*q*).

But according to the later decisions of the Calcutta Court, it practically is of little consequence to the mortgagee, so far as the mortgagor or obligor is concerned, whether in such a case he had got a decree formally declaring his charge on the land,—if he has a money decree under which he attaches and sells the mortgaged property. At a sale under such a decree the whole title passes, as against the mortgagor, just as much as if the decree declared the charge on the land to be good. For it has been held that the taking a mere money decree on a specially registered mortgage bond under sec. 53 of Act XX of 1866, does not extinguish the mortgagee's lien on the mortgaged property: that a proceeding under that section is a suit of civil nature within the meaning of sec. 2 of Act VIII of 1859, independently of any peculiarity in the special procedure to be adopted: and that therefore a creditor who has resorted to the summary procedure under Act XX of 1866 and has recovered a portion of his claim in execution of the decree so obtained, cannot bring a regular suit against the same parties for the enforcement of his remedies under the bond against immoveable property. In the judgment of the majority of the Full Bench Court by which this case was decided, it is said,—“A decree under sec. 53 is at least

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(*p*) *Khettra Mohan Baboo v. Rashbehari Baboo*, 5 B. L. R. 167.

(*q*) *Asma Bihee v. Ram Kant Roy Chowdhry*, 19 W. R. 251;  
*Poorno Chunder Ghose v. Gobind Chunder Mookerjee*, 22 W. R. 28.

equivalent to a money decree in an ordinary suit : and on examination it seems to us that there is no substantial difference between the effect of an ordinary money decree on a mortgage bond and a decree on the same bond for recovery of the money due by sale of the mortgaged property. So that, whether a decree for the money be made under sec. 53 or in a regular suit, the remedy of the mortgagee is the same. When a creditor under a bond by which property is mortgaged takes a money decree and proceeds to attach and sell the mortgaged property, he thereby transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor : and if there be no third party interested in the property, it becomes vested absolutely in the purchaser" (r).

The Allahabad Court, however, dissents from this view of the law, and holds that nothing passes to the purchaser at a sale in execution of a money decree but the right, title and interest of the judgment-debtor at the time of the sale (s).

The old law of registration, Act XIX of 1843, was in force from the 1st May 1843 to the end of 1864.

Under it, the fact of a deed not being registered has been deemed to create a presumption against its genuineness, other things being suspicious (t) : while on the other hand, it has been said that a deed which has been registered and

(r) *Syud Emam Momtazooddeen Mahomed v. Rajcoomar Dass*, 14 B. L. R. 408 (F. B.) (cf., p. 421). See also *Guru Prasad Sahu v. Mussamat Binda Bibi*, 9 B.L.R. 180.

(s) *Khub Chand v. Kalian Das*, I. L. R. 1 All. 240 (F.B.) And see as to this subject generally, *post* Chap. IX.

(t) *Teeka Singh v. Phoolchand*, S.D.A. 1854, p. 529 ; *Neelkaunth Dutt v. Anundmoye Chowdraine*, S.D.A. 1855, p. 218 ; *Muhunt Surrup-dyal v. Muhunt Chettumbonath Koomar Swamee*, S.D.A. N.W.P. 1855, p. 290 ; *Govind Suhace v. Qadira Begum*, S.D.A. N.W.P. 1855, p. 608.

publicly made known at the time of execution will not be set aside except on strong grounds (*u*). And registration effected in a district other than that in which the lands to which the deed referred were situated, cast suspicion on the transaction (*v*).

A registered deed of mortgage was entitled to satisfaction in preference to any other mortgage of the same property, whether of prior or subsequent date, which was not registered. And the fact of the person who obtained priority by registration of his deed, having at the time of registering, full notice, or being aware of the existence of an earlier but unregistered deed, did not prevent his deed from having the preference (*w*).

Act XIX of 1843 gave preference to registered over unregistered deeds, only when the deeds were of the same character; and therefore, a registered deed of sale did not take priority over an unregistered mortgage deed of earlier date,—nor *vice versa*. And a subsequent purchaser whose deed was registered, took the property subject to a prior mortgage though not registered (*x*).

(*u*) *Mussumat. Pran Koour v. Thakoor Khooshal Singh*, S.D.A. N.W.P. 1854, p. 481; *Musst. Benee Koonwur v. Baboo Shannarain Sahie*, S.D.A. 1856, p. 615; *Petition No. 790 of 1856*, S.D.A. 1857, p. 208; *Musst. Jyettarra v. Musst. Lal Beebee*, S.D.A. 1857 p. 956.

(*v*) *Luchmun Singh v. Bhara Mull*, S.D.A. N.W.P. 1854, p. 149. See also *Bhugwanlall Sahoo v. Sheikh Tazodeen Hossein*, S.D.A. 1859, p. 1059.

(*w*) *Prahlad Misser v. Udit Narayan Sing*, 1 B. L. R. (a.c.j.) 197; *Sunkur Sahoy v. Sheo Pershad Sookul*, 16 W. R. 270; *Sreenanth Bhuttacharjee v. Ramcomul Gundopadya*, 10 Moore's I. A. 220; S.C. Suth. P.C. judgments vol. 1, p. 600; *Rikee Ram v. Zalim Singh*, S.D.A. N.W.P. 1851, p. 266; *Petition No. 747 of 1852*, S.D.A. 1853, p. 335; *Krishnasami Pillai v. Venkatachella Aiyar*, 3 Mad. H. C. 89.

(*x*) *Maharajah Moheshur Bux Sing Bahadoor v. Bhikka Chowdry*, 5 W.R. 61 (F.B.); *Prahlad Misser v. Udit Narayan Sing*, 1 B. L. R. (a.c.j.) 197; *Varden Seth Sam v. Luckpathy Royjee Lallah*, 9 Moore's

Where the plaintiff claimed to have a lien under an unregistered bond, upon lands held by the defendant who was the purchaser in possession under a deed of sale later in date than the bond, but duly registered, it was contended that the purchaser was a *bonâ fide* purchaser without notice, and therefore entitled to priority. *Peacock, C.J.*, said (y) : " If the bond was really and *bonâ fide* executed before the date of the defendant's purchase, it would *primâ facie* be entitled to priority, and the defendant could not, according to the decision in the case of *Varden Seth Sam*, succeed without proof that he was a *bonâ fide* purchaser for value without notice. But even if the defendant was to satisfy the Court upon that point, he could not, in my opinion, be entitled to priority, unless the plaintiff was bound to give notice of the bond. If he was not bound to register it, in order to retain priority over subsequent purchasers for value I do not see what notice he could give or was bound to give. \* \* \* \* If the defendant should prove that he was a *bonâ fide* purchaser for value, he would throw the *onus* on the plaintiff of proving that he actually advanced the money as alleged in the bond creating the charge, and that the bond was executed before the defendant's purchase."

A simple mortgagee sold the mortgaged property under a decree : a second mortgagee, who had subsequently obtained a decree, attached the sale proceeds in satisfaction of his (the second mortgagee's) claim, on the ground that although his

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I.A. 303 ; S.C. Marsh. 461 ; *Kartick Chunder Dhobay v. Nobye Sirdar*, S.D.A. 1852, p. 987 ; *Petition* No. 475 of 1849, S.D.A. 1850, p. 77 ; *Petition* No. 227 of 1857, S.D.A. 1857, p. 1667 ; *Dooleykhund v. Hurdeo Suhai*, S.D.A. N.W.P. 1852, p. 124 ; *Luchmun Doss v. Mahomed Hyat Ulee*, S.D.A. N.W.P. 1860, p. 93 ; *Bissonath Singh v. Raj Chunder Roy*, W. R. 1864, p. 141.

(y) *Maharajah Moheshur Bux Sing Bahadoor v. Bhikha Chowdry*, 5 W. R. 61 (F.B.) (cf., p. 63). See also *Prahlad Misser v. Udit Narayan Singh*, 1 B.L.R. (a.c.j.) 197,

deed and decree were the later in date, his deed was registered, while that of the first mortgagee was not. The Court rejected the second mortgagee's application, being of opinion that the time was then past for inquiring into any preferential right that he might consider himself entitled to set up against the first mortgagee on the ground of the non-registration of the latter's mortgage deed (z).

But registration did not give precedence to a subsequent purchaser when a prior *bonâ fide* purchaser had actually been put in possession under his unregistered deed (a).

A contract to sell land at a future period, and a payment of part of the purchase money, though unregistered, was good under the old law as against a subsequent purchaser or mortgagee with notice, although the deed under which the latter claimed was registered (b).

Under Act XIX of 1843, the authenticity of the deed relied on must be established to the satisfaction of the Court, before the Court could decide which deed should have the preference. Where there were two sales, the first a *bonâ fide* one but unregistered, the second a fictitious one but registered, it was held that the deed recording a sale which never in fact took place, and for which no consideration was paid, could not not be considered "authentic" under the terms of the Act, and that its being registered did not give it priority over the other. "There was no sale at all, but a mere pretence. A deed recording a fictitious sale cannot be considered authentic: an authentic document must be a record of a real or actual transaction, not of a fictitious one" (c).

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(z) *Jeetoo Mathoon v. Gopaul Dass*, S.D.A. 1857, p. 147; see also *Jugjeebun Goopto v. Goluck Monee Debia*, 22 W. R. 354.

(a) *Muneeram Dutt v. Unundram*, S.D.A. 1857, p. 1621.

(b) *Ramtonoo Surmah Sircar v. Gour Chunder Surmah Sircar*, 3 W. R. 64; *Shib Kishen Doss v. Sheikh Abdool Sobhan Chowdhry*, 3 W. R. 103.

(c) *Abdool Gunee Chowdree v. Abdool Luteef*, S.D.A. 1853,

In the case of *Sreenanth Bhattacharjee v. Ramcomul Gundopadya* (d), the Privy Council in delivering judgment said : "The proviso is, that the authenticity of the deed be established to the satisfaction of the Court. The word 'authenticity' would seem, according to its natural meaning, to point merely at the exclusion of a forged deed from the benefit of the Act. But their Lordships think that it could not be intended by the Act, that a deed which was tainted by fraud, though in other respects genuine, should be placed on the same footing as an honest *bonâ fide* deed. They are not disposed so to construe the Act ; but they think that at all events a registered deed cannot be deprived of the priority given by the Act, unless it be both alleged and proved that there was fraud on the part of the grantee."

Under the old law, it was the duty of the Registrar to inquire into and ascertain the due execution of a deed presented to him, before admitting it to registration ; but he had no right to institute any inquiry as to the consideration which had passed (e).

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p. 245 ; *Musst. Zeenutoonnissa v. Abdool Alee*, S.D.A. 1858, p. 960 ; *Jogulkishore Goopto v. Jugutchunder Goochoo*, S.D.A. 1858, p. 1051 ; *Joogul v. Bholanath*, S.D.A. N.W.P. 1853, p. 297 ; *Luchmun Singh v. Bhara Mull*, S.D.A. N.W.P. 1854, p. 149 ; *Mussumat Tabindah v. Furzund Ulee*, S.D.A. N.W.P. 1860, p. 267 ; *Bhyroo Chunder Misser v. Ram Chunder Bhattacharjee*, 1 Hay 261 ; *Srishteedhur Lushkur v. Kala Chand Lushkur*, 3 W. R. 216 ; *Mussamut Butoolun v. Mussamut Ozeeran*, 8 W. R. 300.

(d) 10 Moore's I. A. 220 ; S.C. Suth. P.C. judgments, vol. 1, p. 600.

(e) The Agra Sudder Court (No. 803, 19th June 1850) to the Judge of Bareilly, Rep. Sel. Com. on Indian Territories 1852, Ap. p. 614. *Chowdhree Jugernath v. Ramnarain Dass*, S.D.A. N.W.P. 1854, p. 183. But see *Rambhujon Bhukut v. Wodoychunder Jana*, S.D.A. 1856, p. 469.

## CHAPTER VI.

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### OF STAMPS ON INSTRUMENTS OF MORTGAGE.

ALL instruments of mortgage must be written on stamped paper. A document which ought to be, but is not, properly stamped cannot be used in enforcing the rights passed by it: practically, therefore, no instrument of mortgage is effective so long as it is not duly stamped. It may be possible to stamp a document after execution (a); but when it is, a heavy penalty has to be paid for the privilege.

Documents executed prior to the 1st of October 1860 must be stamped in accordance with the law contained in the Regulations. Those executed on or after that date, but before the 1st of June 1862, must be stamped as provided in Act XXXVI of 1860. If executed on or after the 1st of June 1862, and before the 1st of January 1870, they must be stamped in the manner prescribed by Act X of 1862. Act XVIII of 1869 applies to all instruments executed after the commencement of 1870, and before the 1st of April 1879, whilst Act I of 1879 applies to all instruments executed since that date.

*As to instruments executed before the 1st of October 1860.*

All such deeds if executed in Bengal must be stamped as provided for by Bengal Regulation X of 1829 (b). Under

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(a) Act I of 1879, secs. 34, 37, and compare Act XVIII of 1869, secs. 20, 24.

(b) Art. 35 of Schedule A, Bengal Regulation X, 1829, declares that every deed of mortgage or conditional sale, kut-kubala, bye-bil-wufa, bhogbanduk, &c., with or without possession given, of or for any lands, estate or property, real or personal, intended as a security for money due or to be lent thereupon, also every deed or contract accompanied



a general rule in a schedule annexed to this Regulation, the Courts used to hold that if the signature or seals of the parties and witnesses to a deed were not all written on the sheet bearing the stamp, the deed was illegally executed and could not be treated as duly stamped (c). But that general rule was subsequently repealed (d).

When the mortgage deed contained any matter beyond that which was incidental to the mortgage, the same duties were payable as if the mortgage and other matter had been contained in separate instruments. Thus a suit was brought to recover money advanced on a *ticca zur-i-peshgee*,—which apparently was a bond for the sum lent, with interest, accompanied by an agreement that the mortgagee should hold certain lands at an annual rent of Rs. 500, till the advance was paid off. The deed was stamped as a simple bond, and the mortgagee sued on it as such, seeking, not to obtain possession, but only to recover the money lent. It was held that this instrument required the stamp of a lease, and that it was not sufficient that it should be stamped as a bond, the stamp for a simple bond being of smaller value than that for a lease (e).

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with a deposit of title deeds to any property, when the same may be made as the security for the payment of money due or lent at the time, is to be charged with such stamp duty as is in the Regulation declared. The old Madras stamp law is to be found in Madras Regulation XIII of 1816, and that of Bombay in Bombay Regulation XVIII of 1827, which was amended by several subsequent regulations.

(c) *Kudderoonissa v. Rajkoomar Singh*, S.D.A. 1853, p. 965; *Teyk Lal v. Rung Lal*, S.D.A. 1854, p. 464; *Dooloo Pathuk v. Baboo Joychurn Lal*, S.D.A. 1856, p. 556; *Ullee Yar Khan v. Ahmed Biswas*, S.D.A. 1858, p. 477; *Bhuglee Singh v. Ramperkash Singh*, S.D.A. 1858, p. 504.

(d) Act XLI of 1858, sec. 2, since repealed by Act XVIII of 1869, which was in turn repealed by Act I of 1879.

(e) *Khajeh Taleb Alee Khan v. Syed Loof Alee Khan*, S.D.A. 1853, p. 269.

The stamp to be imposed on a document was the largest applicable to its nature, not that required by the nature of the suit (*f*). But if the double matter were immaterial and could be treated as mere surplusage, no stamp was required in respect of it (*g*).

*As to instruments executed on or after the 1st of October 1860, but before the 1st of June 1862.*

Act XXXVI of 1860 is so similar to Act X of 1862 (which came into force on the 1st of June 1862), that it seems sufficient for the purposes of this treatise that the latter only should be referred to. The two Acts do nevertheless differ in various respects : and it is therefore necessary to consider Act XXXVI of 1860 itself, in cases which come within its provisions.

*As to instruments executed on or after the 1st of June 1862, but before the 1st of January 1870.*

Every document of mortgage (*h*) or conditional sale, assignment, pledge, or hypothecation, or of any acknowledgment in the nature of a mortgage, conditional sale, pledge, or hypothecation, of or in respect of any immoveable property with or without possession given, or of any personal property without possession given, intended as a security for money due or to be lent thereupon ; and every deed or contract accompanied with a deposit of title deeds to any property, where the same is made as security for the payment of money due or lent at the time—must bear the same stamp as is required for a bond for the payment of the amount due or lent (*i*).

(*f*) *Baboo Beetukdeonarain v. Sheo Golam Sahoo*, S.D.A. 1853, p. 569 ; *Musst. Kudderonissa v. Rajkoomar Singh*, S.D.A. 1853, p. 942.

(*g*) *Maharajah of Burdwan v. Boidnath Paul*, S.D.A. 1853, p. 828.

(*h*) Act X of 1862, Sch. A, Art. 46.

(*i*) *Ibid*, Art. 12 gives the stamp duty payable in respect of a

Every document of mortgage or conditional sale, assignment, pledge, or hypothecation, or of any acknowledgment in the nature of a mortgage, conditional sale, assignment, pledge, or hypothecation given for a loan or advance made on the deposit of any personal property (*j*), must be stamped as a promissory note (*k*).

Every instrument of mortgage or conditional sale, assignment, pledge, or hypothecation, with or without possession given of any immoveable property, or of any right, title, or interest therein, intended as security for the transfer of a Government security, or for the payment of an annuity for a fixed period, or for the delivery at a future date of any matter or thing capable of being valued, must be stamped as a bond for the total amount assured, or for the *bond fide* value (*l*).

Every document of mortgage, or conditional sale, assignment, pledge, or hypothecation, with or without possession given, of any immoveable property, or of any right, title or interest therein, given for the security of an annuity for an indefinite period, such as a life annuity, is liable to the same stamp as for ten times the annual payment. If it is stipulated that the amount secured by such mortgage shall not exceed a certain sum, it must have the same stamp as for an instrument of mortgage of such limited sum: but when the total amount secured by the mortgage is unlimited, an *optional* stamp (*m*).

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bond or other obligation for the payment either absolutely or conditionally of any definite or certain sum of money.

(*j*) Act X of 1862, Sch. A, Art. 47.

(*k*) *Ibid*, Promissory notes are to be stamped like Bills of Exchange, and Art. 10 lays down the rates for Bills of Exchange.

(*l*) *Ibid*, Art. 48.

(*m*) *Ibid*, Art. 49. See sec. 27, which enacts that no deed having an "optional" stamp shall be held to be valid in respect to any sum of money larger than that for which the stamp on the instrument would be sufficient.

For every document of mortgage where a bond has been already taken for the amount secured, or where, from any other cause, the mortgage is merely a collateral security to some other transaction in which an instrument requiring a stamp has been executed, the stamp must be the same as for the bond or other instrument if of value not exceeding eight rupees,—otherwise a stamp of eight rupees must be imposed (*n*).

Where there are more instruments than one required to execute a mortgage in the manner desired by the parties, then for every deed other than the principal instrument (provided the latter has been duly stamped) the same stamp is required as for the principal document if of value not exceeding eight rupees,—otherwise a stamp of eight rupees (*o*).

An agreement or memorandum in the nature of a mortgage must be stamped as a mortgage (*p*).

*As to instruments executed on or after the 1st of January 1870, but before the 1st of April 1879.*

Act XVIII of 1869 came into force on the 1st of January 1870. In sec. 3, cl. 18 the term “mortgage-deed” is defined as including every instrument evidencing a pledge of property for securing the payment of money : and “property” is declared to mean property being in British India (*q*).

Under this act every mortgage deed (whatever may be the nature of the mortgage) must be stamped as directed by the Act. But the amount of the stamp duty payable is not the same in every case. Art. 5 of Schedule 1 declares the amount of stamp duty payable in respect of a bond for a

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(*n*) Act X of 1862, Sch. A, Art. 50.

(*o*) *Ibid*, Art. 50, *note*.

(*p*) *Ibid*, Art. 1.

(*q*) See *Moran v. Mittu Bibee*, I. L. R. 2 Calc. 58 (cf., p. 87), as to letters of assignment of indigo to be manufactured.

specified amount, not being an administration bond (*r*). A mortgage deed when possession of the property comprised therein is not given by the mortgagor at the time of execution, is liable only to the same stamp duty with which a bond for the amount secured is chargeable (*s*). And so is an instrument of further charge on such property whether by indorsement or otherwise (*t*). A mortgage-deed to secure the due execution of an office, or to account for money received by virtue thereof,—if the amount secured does not exceed Rs. 3,000 is liable to the stamp-duty with which a bond for such amount is chargeable: but if the amount secured exceeds Rs. 3,000, or is not expressed, then the stamp is Rs. 16 (*u*). And so also is an assignment of any interest secured by a bond or mortgage deed (*v*).

But a much heavier stamp is required for a mortgage-deed when possession of the property comprised therein is given by the mortgagor at the time of execution (*w*). And

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(*r*) Act XVIII of 1869, Sch. 1, Art 5. The duty payable is as follows:—When the amount secured does not exceed Rs. 25,—2 annas: when it exceeds Rs. 25 but not Rs. 50,—4 annas: when it exceeds Rs. 50 but not Rs. 100,—8 annas: for every Rs. 100 or part thereof in excess of Rs. 100 up to Rs. 1,000,—8 annas: for every Rs. 500 or part thereof in excess of Rs. 1,000 up to Rs. 10,000,—Rs. 2, and 8 annas: for every Rs. 1,000 or part thereof in excess of Rs. 10,000 up to Rs. 30,000,—Rs. 2, and 8 annas: and for every Rs. 10,000 or part thereof in excess of Rs. 30,000,—Rs. 12 and 8 annas.

(*s*) Act XVIII of 1869, Sch. 1, Arts. 10 and 5.

(*t*) *Ibid*, Art. 11.

(*u*) *Ibid*, Art. 12.

(*v*) *Ibid*, Art. 13.

(*w*) *Ibid*, Art. 16—When the amount secured does not exceed Rs. 50, the duty is 8 annas: when the amount exceeds Rs. 50 but not Rs. 100,—1 rupee: for every Rs. 100 or part thereof in excess of Rs. 100 up to Rs. 1,000,—1 rupee: for every Rs. 500 or part thereof in excess of Rs. 1,000 up to Rs. 10,000,—5 rupees: for every

a similar stamp is payable on an instrument of further charge on such property whether by indorsement or otherwise (*x*).

Every lease, except one granted to a cultivator (*y*), is also liable to stamp duty (*z*), and so is a surrender of a lease (*a*), and a copy, duplicate, or extract attested to be a true copy, duplicate or extract (*b*).

On a counterpart of a mortgage-deed or lease, a stamp of one rupee is payable (*c*). And a bond or mortgage-deed executed as a collateral security for the performance of any act, where such performance is secured by some instrument previously executed on stamped paper in accordance with the law in force in British India at the time of its execution, is liable to a stamp of two rupees (*d*). So also is an instrument evidencing an agreement to secure the repayment, on or before the expiration of three months from the date of such instrument, of a loan made upon the deposit of title-deeds or other valuable security (*e*). On a reconveyance of mortgaged property, when the original mortgage-deed has been stamped in accordance with the law in force here at the time of its execution, there must be paid a stamp duty of four rupees (*f*).

In the absence of agreement to the contrary, the expense of providing the proper stamp shall, in the case of a con-

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Rs. 1,000, or part thereof in excess of Rs. 10,000 up to Rs. 30,000,—5 rupees : for every Rs. 10,000, or part thereof in excess of Rs. 30,000 up to Rs. 100,000,—50 rupees : and for every Rs. 20,000, or part thereof in excess of Rs. 100,000,—75 rupees.

(*x*) Act XVIII of 1869, Sch. I, Art. 17.

(*y*) *Ibid*, Sec. 15, cl. 9.

(*z*) *Ibid*, Sch. I, Art. 19.

(*a*) *Ibid*, Art. 20.

(*b*) *Ibid*, Art. 23.

(*c*) *Ibid*, Sch. II, Art. 16.

(*d*) *Ibid*, Art. 20.

(*e*) *Ibid*, Art. 21.

(*f*) *Ibid*, Art. 27.

veyance, mortgage-deed or lease, be borne by the grantee, mortgagor or lessee,—and in the case of a counterpart of a lease by the lessor (*g*). Instruments reserving interest are not chargeable with a higher duty than that which would have been payable had interest not been mentioned (*h*).

When the value of the subject-matter of a bond or mortgage-deed cannot be ascertained, the proper stamp to be borne by the instrument may be determined by the person by whom the expense of providing the stamp has to be borne: but under such instrument nothing is recoverable beyond the highest amount for which, if stated in an instrument of the same denomination, the stamp actually used would have been sufficient (*i*).

The whole amount secured, for the payment of an annuity or other sum payable periodically for an indefinite time, by a bond or mortgage-deed, shall (as regards the stamp duty) be deemed to be ten times the amount of the payment calculated for one year (*j*).

Where more instruments than one are required for the completion of a transaction involving the execution of a mortgage-deed, &c., the proper stamp shall be borne by the principal instrument executed, and each of the other instruments shall bear a stamp of one rupee; but the instrument liable to the highest rate of duty shall be deemed the principal instrument: and if it is doubtful under what precise definition an instrument falls, it must be stamped according to the highest rate which can be applied to it (*k*).

This Act further declared that no instrument which is not properly stamped can be received in any Court of

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(*g*) Act XVIII of 1869, sec. 6.

(*h*) *Ibid*, Sec. 9.

(*i*) *Ibid*, Secs. 11 and 6.

(*j*) *Ibid*, Sec. 12.

(*k*) *Ibid*, Secs. 13 and 14.



justice or by any person having authority to receive evidence, as creating, modifying or extinguishing any right or obligation,—or as evidence in any civil proceeding: nor can it be acted on by any Court or any public officer: nor can it be registered or authenticated by any public officer (*l*). But it is admissible in any criminal proceeding, save under Ch. XL of the Code of Criminal Procedure (Act X of 1872) (*m*).

The same Act also enacted that if an instrument not properly stamped is produced in a Civil Court, the Court, if satisfied that the omission to execute the instrument on proper paper did not arise out of any intention to evade payment of the duty, may receive such duty together with a heavy penalty (on a scale prescribed by the law) and shall certify by endorsement on the instrument that the proper duty has been levied on it: and this certificate is conclusive evidence as to the amount of stamp duty leviable on the instrument, which thereupon becomes admissible as if originally executed on paper bearing the proper stamp (*n*).

A judge acting under this section received the stamp duty payable on a document, together with the penalty, and endorsed his certificate on it. Immediately afterwards (as the case proceeded and he came to read the document carefully) he found that he had made a mistake. It was clear upon the face of the document that in omitting to stamp it, the parties were intentionally evading the stamp law: and the Court found as a fact that they acted with that intention. Nevertheless, the Judge having already endorsed his certificate, received the document in evidence. On appeal, the High Court held that a certificate granted under such circumstances was not such a certificate as is

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(*l*) Act XVIII of 1869, sec. 18.

(*m*) *Ibid.*

(*n*) *Ibid*, Sec. 20.

contemplated by section 20, and did not render the document admissible (o).

Under the same Act any one who, with the intention of evading the stamp law, executes a document on unstamped or insufficiently stamped paper, exposes himself to the risk of a criminal prosecution: for when any such instrument is filed or exhibited in any Court, the Court may impound it and send it to the Collector,—who is directed by the Act thereupon to prosecute the offender. And there is a similar danger if the document is produced before any registering or other public officer (p).

If there is a doubt as to the proper duty to be paid the Act permits an application to be made to the Collector, who will adjudicate on the question (q). His decision, however, is open to revision on appeal, by the chief controlling revenue authority (r),—who may make a reference to the High Court (s). When any document is produced before the Collector otherwise than for the purpose of obtaining an adjudication as to the proper stamp to be paid,—or is sent to him by a registering or other officer (under section 23), the Collector may deal with the case like a Civil Court acting under section 20,—or he may remit the penalty (t).

When any property is sold and conveyed subject to any bond or other debt, or to any gross or entire sum of money, the Act declares that such debt or sum shall be deemed the consideration money or part of the consideration money (as the case may be) in respect whereof the stamp duty

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(o) *Prosunno Nath Lahiree v. Tripoora Soonduree Dabee*, 24 W. R. 88.

(p) Act XVIII of 1869, Secs. 22, 23, 24, 29, 43.

(q) *Ibid*, Sec. 39.

(r) *Ibid*, Sec. 40.

(s) *Ibid*, Sec. 41.

(t) *Ibid*, Sec. 24.

is to be paid. And if the full consideration money is not set forth as directed by the Act, severe penalties are incurred by both seller and purchaser (*u*). And any attorney, vakil, mukhtar or other person employed in preparing an instrument in which the Act requires the full consideration money to be truly set forth, who knowingly inserts in the instrument any other than the full consideration, also makes himself liable to heavy penalties,—extending in the case of an attorney, vakil or mukhtar to disability to practice (*v*).

*As to instruments executed on or after the 1st of April 1879.*

The present stamp law—Act I of 1879—came into force on the 1st of April 1879. Though it re-enacts many of the provisions of Act XVIII of 1869, still it differs in many and important points from that Act. It seems, however, sufficient for the purposes of this treatise to notice here only such of its provisions as have a bearing on the subject of the law of mortgage.

Act I of 1879 contains a new definition of the term mortgage-deed. Under this Act (*w*) it includes every instrument whereby for the purpose of securing money advanced, or to be advanced, by way of loan, or on existing or future debt, or the performance of an engagement, one person transfers or creates, to or in favour of another, a right over specified property (*x*).

The present Act distinguishes, not only, like the Act of 1869, between mortgages under which possession is and is not given, but also between mortgages under which possession is and is not agreed to be given. It further makes certain alterations in the rates of duty payable in respect

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(*u*) Act XVIII of 1869, Sec. 34.

(*v*) *Ibid*, Sec. 35.

(*w*) Act I of 1879, Sec. 3, cl. (13).

(*x*) Compare Act XVIII of 1869, Sec. 3, cl. 18.

of mortgage transactions. Under it (y) every mortgage-deed, other than a mortgage-deed executed by way of security for the due execution of an office or to account for money received by virtue thereof, a bottomry bond, an instrument evidencing an agreement to secure the repayment of a loan made upon the deposit of title deeds or other valuable security, or upon the hypothecation of moveable property, or a respondentia-bond is liable to the following stamp duty, *viz.*—(A) when at the time of execution possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given, to the same duty as a conveyance for a consideration equal to the amount secured by such deed (z): (B) when at the time of execution possession is not given or agreed to be given as aforesaid, to the same duty as a bond for the amount secured by such deed (a). And the same distinction is drawn in the case of instruments imposing a further charge on mortgaged property, one duty being imposed when the original mortgage is one of the description referred to in Art. 44, cl. (A) and another when such

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(y) Act I of 1879, Sch. I, Art. 44. Compare Act XVIII of 1869, Sch. I, Arts. 10 and 16.

(z) The duty payable on a conveyance (Act I of 1879, Sch. I, Art. 21) is as follows:—When the amount of the consideration for such conveyance as set forth therein does not exceed Rs. 50—eight annas; when it exceeds Rs. 50 and does not exceed Rs. 100—one rupee; for every Rs. 100 or part thereof in excess of Rs. 100 up to Rs. 1,000—one rupee; and for every Rs. 500 or part thereof in excess of Rs. 1,000—five rupees.

(a) The duty payable on a bond (Act I of 1879, Sch. I, Art. 13) is as follows:—When the amount or value secured does not exceed Rs. 10—two annas; when such amount or value exceeds Rs. 10 but does not exceed Rs. 50—four annas; when such amount or value exceeds Rs. 50 but does not exceed Rs. 100—eight annas; for every Rs. 100 or part thereof in excess of Rs. 100 up to Rs. 1,000—eight annas; and for every Rs. 500 or part thereof in excess of Rs. 1,000—two rupees eight annas.

mortgage is one of the description referred to in Art. 44, cl. (B) (b).

The question of the difference between the two classes of mortgages named in Art. 44 has recently been considered by the High Court of Calcutta (c). Though the Court was unanimous in holding that none of the mortgage-deeds forming the subject of the reference to it fell under cl. (A) of that article, the different Judges who formed the Bench do not appear to have come to this conclusion for exactly the same reasons. It was held by *Garth, C.J.*, that where the title to the land, and the possession or immediate right to the possession, both pass to the mortgagee by virtue of the deed, the same duty is charged as upon a conveyance by way of sale, because in that instance the mortgagee gets the same potentiary interest in the land which a sale would give him; but when the title only passes, and possession, or the right to possession, does not, the interest which he gets is not necessarily a potentiary interest at all, and possibly may never become so. In such a case the lower duty is chargeable. It was ruled by *Mitter, J.*, that the word "given" in cl. (A) of Art. 44 seemed to point out that only those transactions were intended to be covered where the transfer of possession takes place *in consequence of the agreement on the part of the mortgagor to deliver over possession as part of the security of the mortgage money*, but that where by virtue of a stipulation in the mortgage deed, the mortgagee becomes entitled to enter upon possession quite irrespective of the consent of the mortgagor to make over possession, the clause in question did not apply;

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(b) Act I of 1879, Sch. I, Art. 30. Compare Act XVIII of 1869, Sch. I, Arts. 11 and 17. It may be noticed that this article is defective, inasmuch as it does not provide for the not uncommon case of a further charge *with* possession, when the original mortgage was *without* possession. As the article now stands such a further charge would seem to be liable only to the lower rate of duty, a result which could not have been intended.

(c) *Anonymous case*, I. L. R. 10 Calc. 274.

because there it could not be said that the mortgagor consented to give possession. Lastly, *Field, J.*, was of opinion that the words "agreed to be given" in clause (A) of the article, though they covered cases in which it was agreed that possession should be given *at any time*, could only apply where there was an express or implied agreement to give possession, and that the clause did not apply where there was no such agreement, express or implied, but the effect of the document between the parties was such that the mortgagee would have a right, which he could enforce in a Court of law, to obtain possession if he desired to have possession.

A mortgage-deed executed by way of security for the due execution of an office, or to account for money received by virtue thereof is liable, if the amount secured does not exceed Rs. 1,000, to the same duty as a bond (*d*), and in any other case, to a duty of five rupees (*e*), and a similar duty is leviable in the case of an assignment or transfer of any interest created by a mortgage-deed (*f*).

The Act also prescribes different rates of duty in the case of leases (*g*), and surrenders of leases (*h*), from those prescribed by the Act of 1869.

The rates of duty payable in respect of copies or extracts and counterparts or duplicates are also altered under Act I of 1879. The duty payable on a copy or extract certified to be a true copy or extract, by or by order of any public officer and not chargeable under the law for the time being in force relating to Court-fees, is, if the original was not

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(*d*) See *supra*, page 244 note (*a*).

(*e*) Act I of 1879, Sch. I, Art. 14. Compare Act XVIII of 1869, Sch. I, Art. 12.

(*f*) *Ibid*, Sch. I, Art. 60 (*B*). Compare Act XVIII of 1869, Sch. I, Art. 13.

(*g*) *Ibid*, Sch. I, Art. 39. Compare Act XVIII of 1869, Sch. I, Art. 19.

(*h*) *Ibid*, Sch. I, Art. 59. Compare Act XVIII of 1869, Sch. I, Art. 20.



chargeable with duty, or if the duty with which it was chargeable does not exceed one rupee, eight annas, and in any other case, one rupee (*i*), whilst a counterpart or duplicate of any instrument chargeable with duty and in respect of which the proper duty has been paid, is liable, if the duty with which the original instrument is chargeable does not exceed one rupee, to the same duty as is chargeable on the original, and in any other case to a duty of one rupee (*j*).

Under the existing law on an instrument evidencing an agreement to secure the repayment of a loan made upon the deposit of title-deeds or other valuable security, or upon the hypothecation of moveable property, there must be paid, when such loan is repayable more than three months, but not more than one year from the date of such instrument, the same duty as on a bill of exchange (*k*), payable otherwise than on demand, but not more than one year after date or sight, for the amount secured, and when such loan is repayable not more than three months from the date of such instrument, half the duty payable on such a bill of exchange for the amount secured (*l*).

A reconveyance of mortgaged property is now subject, if the consideration for which the property was mortgaged does not exceed Rs. 1,000, to the same duty as a conveyance (*m*) for the amount of such consideration as set forth in the reconveyance, and in any other case to a duty of ten rupees (*n*); whilst a release, that is to say, any instrument

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(*i*) Act I of 1879, Sch. I, Art. 22. Compare Act XVIII of 1869, Sch. I, Art. 23.

(*j*) *Ibid*, Sch. I, Art. 23. Compare Act XVIII of 1869, Sch. I, Art. 23.

(*k*) *Ibid*, Sch. I, Art. 11 (*b*).

(*l*) *Ibid*, Sch. I, Art. 29. Compare Act XVIII of 1869, Sch. II, Art. 21.

(*m*) See *supra*, page 244 note (*z*).

(*n*) Act I of 1879, Sch. I, Art. 53. Compare Act XVIII of 1869, Sch. II, Art. 27.



whereby a person renounces a claim upon another person or against any specified property, is liable, if the amount or value of the claim does not exceed Rs. 1,000, to the same duty as a bond (o) for such amount or value as is set forth in the release, and in any other case, to a duty of five rupees (p).

Section 9 of the present Act empowers the Governor-General in Council to make rules to regulate in the case of each kind of instrument, when no provision contained in the Act is applicable thereto, the description of stamps which may be used. By the rules made under the section (q), mortgage-deeds must be written on impressed sheets (r), except when written in a European language when an impressed label may be used (s), and impressed stamps are declared to include impressed sheets and impressed labels (t).

Section 12 of the Act (which is new) (u), enacts that every instrument written upon paper stamped with an impressed stamp (which mortgages must be under the rules above referred to) shall be written in such manner, that the stamps may appear on the face of the instrument and cannot be used for or applied to any other instrument. This section has been considered by the High Court at Bombay (v), with special reference to the construction of the words "on the face of the instrument." The Court said (w) "that section" (sec. 12) " (which is substantially

(o) See *supra*, page 244 note (a).

(p) Act I of 1878, Sch. I, Art. 54. Compare Act XVIII of 1869, Sch. II, Art. 30.

(q) See Financial Notification No. 1238, dated the 3rd March 1882, *Gazette of India*, dated the 11th March 1882, p. 131.

(r) *Ibid*, Rule 4.

(s) *Ibid*, Rule 8.

(t) *Ibid*, Rule 3.

(u) Act I of 1879. See 33 and 34 Vic, ch. 97, s. 7.

(v) *Dowlatram Harji v. Vilho Radhoji*, I. L. R. 5 Bom. 188.

(w) *Ibid*, cf. p. 194.

similar to sec. 7, cl. I of the Statute 33 and 34 Vic., c. 97), seems like sec. 11 to contemplate two objects (1) that the stamp should not be defaced or made illegible: (2) that the writing should not be so distant from the stamp as to admit of its being used again for another instrument: for instance, by cutting off the part of the paper previously written upon, and writing a fresh instrument upon the portion left blank. \* \* \* In ordinary legal parlance, when the face of a deed or document is mentioned, no particular side or sheet of the parchment or paper, on which the deed or document is written, is thereby indicated. The last line on the second side, or if the deed or document consists of more sheets than one, the last line on the last side or sheet, if part of the text or body of the instrument, is deemed to be as much upon the face of it as the first line on the first side or sheet. Ordinarily, if the instrument be of sufficient length, both sides of the paper are written upon. The 12th section of Act I of 1879 does not say that the instrument must commence on the side on which the stamp is impressed, or that only one side may be written upon. The imposition of such excessive and minute details would be pitfalls to the unwary, and would, by frequently invalidating documents, press harshly upon the illiterate classes, and overthrow thousands of honest transactions without producing any such advantageous result in the form of revenue to the State as would compensate it for the discontent which would be occasioned. The Legislature has avoided such stringent details and seems to us to have satisfied itself by legislating against defacement of the impressed stamp, and against such a mode of penning the document as would admit of that stamp being used for, or applied to any other instrument."

The following section (x) which prohibits a second instrument chargeable with duty being written upon a piece

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(x) Act I of 1879, sec. 13.

of stamped paper upon which an instrument chargeable with duty has already been written, is also a new provision. Though secs. 14 declares that every instrument written in contravention of secs. 12 or 13 shall be deemed to be unstamped, the possibility of any hardship being caused by this section is guarded against by the provisions of sec. 37, which empower the Collector to remit, if he thinks fit, the penalty in such cases, and by the provision in sec. 54 for the allowance of the value of the stamp when it has been inadvertently rendered useless under sec. 14, owing to the instrument for which it has been used having been written in contravention of the provisions of sec. 12.

The provisions of the present Act defining the persons by whom duties are payable (*y*): declaring that instruments reserving interest are not chargeable with a higher duty than that which would have been payable had interest not been mentioned (*z*): prescribing the duty in cases where the value of the subject-matter is indeterminate (*a*): and laying down rules as to the duty payable in cases where several instruments are employed in completing a single transaction (*b*), or the same instrument relates to several distinct matters (*c*), or an instrument comes within two or more of the descriptions given in the schedule (*d*) are very similar to the corresponding provisions of the Act of 1869 (*e*), which have been set out above (*f*).

In consideration of a former loan being allowed to continue, and of an additional loan being made, a lease was granted

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(*y*) Act I of 1879, sec. 29.

(*z*) *Ibid.*, sec. 23.

(*a*) *Ibid.*, sec. 26.

(*b*) *Ibid.*, sec. 6.

(*c*) *Ibid.*, sec. 7.

(*d*) *Ibid.*, sec. 7.

(*e*) Act XVIII of 1869, secs. 6, 9, 11, 13 and 14.

(*f*) See *supra*, p. 240.

of certain properties, upon terms which secured to the lessees the repayment of the whole sum with interest by yearly instalments, and at the same time secured to the lessor a substantial share in the usufruct of the property. The Court held that the arrangement in question was partly a lease and partly a usufructuary mortgage, but that, as the loan was the consideration for the lease, and the lease the consideration for the loan, it was impossible to say that the instrument containing the arrangement was one relating to two distinct matters within the meaning of the first clause of sec. 7 of Act I of 1879. That clause relates only to transactions so distinct in their nature as to be capable of being carried out by two or more instruments instead of one, whereas here the contract was essentially one transaction. On the other hand, the case fell within the second clause of sec. 7, the instrument being one, which answered two of the descriptions in the first schedule, and which was therefore chargeable with the highest duty which could be imposed on an instrument of either description. The instrument in question should therefore be stamped as a mortgage only (g).

But the provisions of Act I of 1879 with regard to the valuation of an instrument executed to secure the payment of an annuity or other sum payable periodically, do differ somewhat from the former provisions (h). It is now declared that (1) where the sum is payable for a definite period so that the total amount to be paid can be previously ascertained, the value for the purposes of duty shall be deemed to be such total amount: (2) where the sum is payable in perpetuity or for an indefinite time not terminable with any life in being at the date of the instrument, such value shall be deemed to be the total amount which, according to the terms

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(g) *In the matter of a Reference from the Board of Revenue under sec. 46 of the General Stamp Act, Ex parte Hill*, I. L. R. 8 Calc. 254.

(h) See Act XVIII of 1869, sec. 12.

of such instrument, will or may be payable during the period of twenty years next after the date of such instrument : and (3) where the sum is payable for an indefinite term terminable with any life in being at the date of such instrument, such value shall be deemed to be the total amount which will or may be payable as aforesaid during the period of twelve years next after the date of such instrument (i).

The existing Act further contains certain provisions, dealing with the valuation of instruments chargeable with *ad valorem* duty in respect of an amount expressed in any foreign currency (j), or in respect of any stock or marketable security (k), and declaring the effect of the statement in an instrument of the current rate of exchange or average price (l), which are not to be found in the Act of 1869.

Sec. 24 of the present Act is also new (m). It enacts that where any property is transferred to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such debt money or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the transfer is chargeable with *ad valorem* duty.

It has been held by a Full Bench of the Bombay High Court, in a case in which the instrument in question was a certificate of sale, that there was not any difference under the Indian Stamp Act, 1879, in respect of stamp duty between a certificate of sale by public auction and a conveyance by way of private sale, and that, if property be sold expressly subject to a debt due upon a mortgage of such property, that

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(i). Act I of 1879, sec. 25. Compare 33 and 34 Vic., c. 97, sec. 72.

(j). *Ibid*, sec. 20. Compare 33 and 34 Vic., c. 97, sec. 14.

(k). *Ibid*, sec. 21. Compare 33 and 34 Vic., c. 97, sec. 12.

(l). *Ibid*, sec. 22. Compare 33 and 34 Vic., c. 97, sec. 13.

(m). Compare 33 and 34 Vic., c. 97, sec. 73.

debt must, under sec. 24, be added to the further sum (if any) given as purchase money, in order to ascertain the total amount of consideration of the certificate of sale or the private conveyance, as the case may be, upon which the stamp duty is payable. But it is the amount due on the mortgage or other incumbrance, for principal only, at the time of the sale, which is chargeable with stamp duty. The exemption from stamp duty in respect of interest made by sec. 23 is not limited to the mortgage or other instrument by which the interest was originally made payable, but applies also in the case of a document of transfer made subject to a mortgage or other incumbrance on which interest is already due or may hereafter accrue due (n).

A Full Bench of the Madras High Court has however put a different construction on the provisions of sec. 24. In the case in question the Full Bench held that the stamp duty payable on a certificate of sale is governed not by sec. 24, but by Clause 16, Schedule I of the Indian Stamp Act, 1879. At the same time the Court declared that if it were necessary to determine the construction of sec. 24, they should be inclined to hold that unless property be transferred, accompanied by an undertaking to discharge a mortgage to which the property was subject, it was not transferred "subject to the payment" of the mortgage debt within the meaning of that section (o).

And this view of the section has been adopted by the Calcutta High Court in a recent reference. In this case the Court apparently assumed that sec. 24 of Act I of 1879 was applicable in the case of a certificate of sale, and held that "where property is sold subject expressly to the payment or transfer by the purchaser of any money or stock, whether such money or stock be charged upon the property or not,

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(n). *Sha Nagindas Jeychand v. Halalkore Nathwa Gheesla*, I. L. R. 5 Bom. 470 (F. B.).

(o) *Reference from a District Judge under sec. 49 of the General Stamp Act*, I. L. R. 5 Mad. 18 (F. B.).



such payment or transfer becomes the consideration for the sale; and as soon as it is paid or transferred, and not till then, the purchaser is entitled to his conveyance. In such a case it is perfectly fair that the *ad valorem* stamp duty should be calculated upon the amount of such money or stock. But where a property is merely sold subject to a mortgage or other charge, the payment of such mortgage or charge forms, under ordinary circumstances, no part of the consideration for the purchase. The vendor simply sells, and the purchaser buys an encumbered property; and it is in no way essential to the validity of the sale that the mortgage or charge should be paid off" (p).

Moreover, the provisions of the Indian Stamp Act, 1879, with regard to instruments not duly stamped and the punishment of offences are by no means a simple re-enactment of those in the Act of 1869 (q).

The present Act requires every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument chargeable in his opinion with duty is produced or comes, to examine the same, and if it appears to him that such instrument is not duly stamped, to impound the same. Magistrates and Judges of Criminal Courts are, however, exempted from the obligation of so examining and impounding instruments except in the course of proceedings under chapters XL or XLI of the Code of Criminal Procedure (Act X of 1872), or chapter XVIII of the Presidency Magistrate's Act (Act IV of 1877) (r), and in the case of a High Court Judge the duty may be

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(p) *Reference from the Board of Revenue*, I. L. R. 10 Calc. 92 (cf. p. 95).

(q) Act XVIII of 1869, Chaps. III and IV.

(r) Chaps. XII and XXXVI are the corresponding provisions of the present Code (Act X of 1882), which repeals both X of 1872 and Act IV of 1877.



delegated to such officer as the Court appoints in this behalf (s). No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped. Any such instrument, not being an instrument chargeable with a duty of one anna only or a bill of exchange or promissory note, may nevertheless, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or (in the case of an instrument insufficiently stamped) of the amount required to make up such duty, together with a penalty of Rs. 5 or when ten times the amount of the proper duty or deficient portion thereof exceeds rupees five, of a sum equal to ten times such duty or portion. But nothing in the section prevents the admission of an instrument in evidence in any criminal proceeding other than a proceeding under chapter XL or XLI of the Code of Criminal Procedure (Act X of 1872), or chapter XVIII of the Presidency Magistrates Act (Act IV of 1877) (t).

It was ruled by *Mahmood, J.*, in a late Allahabad case (u) that the question of the admissibility in evidence of a document which was said to have been made in 1868, when Act X of 1862 was the stamp law, must be decided according to the rule laid down in this section. The rule of the stamp law prohibiting the admission of unstamped documents, being a rule which belongs to the remedy, *ad litem ordinationem*, is to be enforced according to the law in force at the time when the suit is brought, not according to the provisions of repealed laws.

The same section lays down the rule that when an instru-

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(s) Act I of 1879, sec. 33.

(t) *Ibid*, sec. 34. For the corresponding provisions of the present Code see *supra*, p. 254, note (r).

(u) *Shankar Lal v. Sukhrani*, I. L. R. 4 All. 462, (cf. p. 477).

ment has once been admitted in evidence, such admission shall not be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped (v). This provision settles a question regarding which there was formerly some conflict of opinion (w).

But in connection with this point, sec. 50 of the Act, which has been enacted for the protection of the revenue, should be noticed. That section empowers the Appellate Court, either of its own motion or on the application of the Collector, to take into consideration any order of the lower Court admitting any instrument in evidence as duly stamped, or as not requiring a stamp, or upon payment of duty and a penalty; and if it is of opinion that such instrument should not have been admitted in evidence without the payment of duty and penalty, or without the payment of a higher duty and penalty than those paid, the Appellate Court may record a declaration to that effect and determine the amount of duty with which such instrument is chargeable, and may require any person in whose possession or power such instrument then is to produce the same, and may impound the same when produced. The Court is further directed to send any declaration recorded under the section together with the instrument, if it has been impounded or is otherwise in the possession of the Court, to the Collector, who thereupon may prosecute any person for any offence against the stamp law which the Collector considers him to have committed

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(v) Act I of 1879, sec. 34, 3rd proviso. See *Ramasami Chetti v. Ramasami Chetti*, I. L. R. 5 Mad. 220.

(w) See *Currie v. S. V. Mutu Ramen Chetty*, 3 B. L. R. (a.c.j.) 126; *Ibrahim Azim v. W. D. Cruickshank*, 7 B. L. R. 653; *Kastur Bhavani v. Appa*, I. L. R. 5 Bom. 621; Contra see *Adinarayana Setti v. Minchin*, 3 Mad. H. C. 297. See also *Safdar Ali Khan v. Lackman Das*, I. L. R. 2 All. 554 (cf. p. 559).

in respect of such instrument. But no prosecution is to be instituted when the amount (including duty and penalty) which according to the determination of the Court was payable in respect of the instrument is paid to the Collector, unless he thinks that the offence was committed with an intention of evading payment of the proper duty. Moreover, except for the purposes of such prosecution, a declaration made under the section shall not affect the validity of any order admitting any instrument in evidence, or any certificate granted under sec. 39 (*x*).

When an impounded instrument has been admitted in evidence upon payment of a penalty, the person impounding the instrument shall send to the Collector an authenticated copy of the same, together with a certificate in writing, stating the amount of the duty and penalty levied in respect thereof, and shall send such amount to the Collector or to such person as he may appoint in his behalf. In every other case the person impounding an instrument shall send it in original to the Collector (*y*). The following sections give the Collector power to refund the penalty, or a portion thereof, which has been paid in respect of any instrument a copy of which has been sent to him by the person who has admitted the same in evidence (*z*), and prescribe the procedure, he shall adopt, when he impounds an instrument, or receives an instrument, which has not been admitted in evidence by a person having by law or consent of parties authority to receive evidence (*a*), or when an instrument not duly stamped through accident, mistake or urgent necessity is produced before him (*b*).

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(*x*) Act I of 1879, sec. 50.

(*y*) *Ibid*, sec. 35.

(*z*) *Ibid*, sec. 36.

(*a*) *Ibid*, sec. 37.

(*b*) *Ibid*, sec. 38.

The Act further provides that when the duty and penalty (if any) leviable in respect of any instrument has been paid either to a person admitting a document in evidence or to the Collector, such person or Collector (as the case may be) shall certify by endorsement thereon that the proper duty, or (as the case may be) the proper duty and penalty (stating the amount of each) have been levied in respect thereof, and the name and residence of the persons paying them. Every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped, and shall be delivered, on his application in this behalf, to the person from whose possession it came into the hands of the officer impounding it, or as such person may direct, provided that no instrument which has been admitted in evidence upon payment of duty and a penalty shall be so delivered before the expiration of one month from the date of such impounding, or if the Collector has certified that its further detention is necessary and has not cancelled such certificate, provided also that nothing in the section shall affect the Code of Civil Procedure, section 144, clause 3 (c). But the payment of a penalty in respect of an instrument does not bar the prosecution of any person who appears to have committed an offence against the stamp law in respect of such instrument. No such prosecution shall, however, be instituted in the case of any instrument in respect of which such a penalty has been paid, unless it appears to the Collector that the offence was committed with an intention of avoiding payment of the proper duty (d).

Any person who executes or signs otherwise than as a witness any instrument, other than a bill of exchange, cheque or promissory note, chargeable with duty without the same being

(c) Act I of 1879, sec. 39. The Code referred to is Act X of 1877, but the corresponding section in the Present Code (Act XIV of 1882) is the same.

(d) Act I of 1879, sec. 40.

duly stamped (e) is liable to a fine of five hundred rupees. If however a penalty has already been paid in respect of the instrument, the amount of such penalty will be allowed in reduction of the fine (if any) subsequently imposed, in respect of the same instrument, upon the person who paid such penalty (f). Any person who with intent to defraud the Government of any duty executes any instrument in which the consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of the duty with which it is chargeable are not fully and truly set forth, or being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all such facts and circumstances is liable to a fine of five thousand rupees (g).

It has been held that the question of intention is one which the Magistrate is bound to consider in the case of a prosecution under sec. 29 of Act XVIII of 1869 (h). It is impossible for him to exercise any discretion in fixing the fine or to say what fine ought in any particular case to be imposed unless he is at liberty to determine whether the person prosecuted has used no stamp or an insufficient one from a *bonâ fide* mistake, or from carelessness, or with intent to evade payment of the stamp duty (i). The ruling in this case would seem to apply equally to the provisions of the present Act, which do not in this respect differ materially from those of the Act of 1869.

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(e) "Duly stamped" as applied to an instrument, means stamped, or written upon paper bearing an impressed stamp, in accordance with the law in force in British India when such instrument was executed or first executed. See Act I of 1879, sec. 3 cl. (10).

(f) Act I of 1879, sec. 61.

(g) *Ibid*, secs. 27 and 63.

(h) Compare Act I of 1879, sec. 61.

(i) *Empress v. Dwarkanath Chowdhry*, I. L. R. 2 Cal. 399 (F.B.).

"The Stamp Act is a fiscal enactment and must be strictly construed; and before any person can be punished for an offence relating to the stamp revenue, the procedure prescribed by the Act must be strictly followed" (*j*). So where an instrument is forwarded to a Collector under the second clause of sec. 35 of Act I of 1879, he is bound to pursue the course laid down by sec. 37 of the Act, and, if he is of opinion that the instrument is chargeable with duty, and is not duly stamped, to require the payment of the proper duty or the amount required to make up the same, together with a penalty (*k*). The payment of this duty and penalty is no bar to the prosecution of any person who appears to have committed an offence against the stamp law in respect of the instrument (*l*), but before a criminal prosecution can be instituted it is incumbent on the Collector, under the proviso to that section to form an opinion whether it appears to him that the offence was committed with an intention of evading payment of the proper duty (*m*).

It has been held by the Allahabad Court that the Collector, being primarily responsible under the Stamp Acts of 1869 and 1879 for the institution of prosecutions for offences against these Acts, should not himself try, as a Magistrate, a person accused of an offence against either of these Acts (*n*).

It may be noticed that the provisions in the present Act on the subject of adjudication as to stamps (*o*) differ, amongst other respects, from those of the Act of 1869 in that they extend to drafts of instruments brought to the adjudication.

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(*j*) Per *Field, J.*, in *Empress v. Soddanund Mahanty*, I. L. R. 8 Calc. 259 (cf. p. 262); see also the remarks of the same Judge in *Anonymous case*, I. L. R. 10 Calc. 274 (cf. p. 282.)

(*k*) Act I of 1879, sec. 37, cl. (b).

(*l*) *Ibid.*, sec. 40.

(*m*) *Empress v. Soddanund Mahanty*, I. L. R. 8 Calc. 259.

(*n*) *Empress v. Deeki Nandan Lal*, I. L. R. 2 All. 806.

(*o*) Act I of 1879, chap. III.



cating officer prior to their execution, and empower the Collector to require an abstract of the instrument to be furnished to him (*p*). Many of the provisions in Chapter V (Reference and Revision) are also new, amongst which are to be found the provisions referred to above, empowering the Appellate Court, either of its own motion or on the application by the Collector, to take an order of the lower court on the question of stamp duty into consideration (*q*). It may further be observed that the Act does not contain any provision similar to section 40 of the Act of 1869, allowing appeals against, or revisions of certificates or orders of a Collector.

When a document is tendered for a purpose collateral to the object of the document, and its admission does not involve giving effect to it as operative between the parties to it, it is admissible in evidence even though unstamped (*r*.)

In a recent Allahabad case the effect of an unstamped transfer of a mortgagee's interest was considered. In that case a mortgagee had transferred his interest under his mortgage to a third person by an unstamped endorsement on the mortgage-deed. Subsequently, on the transferee finding that the Courts would not recognize his title owing to the endorsement on the mortgage-deed being unstamped, the transferee, in pursuance of the award of certain arbitrators to whom the matter was referred, returned the deed of mortgage to the mortgagee, who was directed by the arbitrators, but failed, to return to the transferee the amount of the consideration for the transfer which he had received from him. In a suit by the mortgagee, the mortgage having been foreclosed on his application, for proprietary possession of the mortgaged property, it was held

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(*p*) Act I of 1879, sec. 30. Compare 33 and 34 Vic., c. 97, s. 20.

(*q*) *Ibid*, sec. 50. See *ante* pp. 256-257.

(*r*) *Rustomji Edulji Croos v. Cursetji Coralji Croos*, I. L. R. 4 Bom. 349.



by *Straight, J.*, that the suit was not, and by *Mahmood, J.*, that the suit was, maintainable (s). *Straight, J.*, was of opinion that the transfer by endorsement of the deed of mortgage, notwithstanding such transfer was not stamped, transferred to the transferee the mortgagee's interest in the property; that such interest could not be re-transferred to the mortgagee except by a formal instrument stamped according to law, inasmuch as any other mode of re-transfer would leave the mortgagee under the same disabilities as regards the stamp law as the transferee, as any suit instituted by the mortgagee would, strictly speaking, be based, not on the deed of mortgage, but on the re-transfer; and that therefore under these circumstances, and having regard to the fact that the mortgagee had not returned the consideration for the transfer to the transferee, the mortgagee actually, though not ostensibly, based his suit upon a re-transfer which was not stamped, and for which he had not given any consideration. On the other hand, *Mahmood, J.*, held that the unstamped transfer by endorsement was inadmissible to show that the mortgagee had transferred his interest in the deed of mortgage, whether the transferee or the mortgagors wished to use it in order to show that fact, and consequently the mortgagee must still be regarded as the person interested in the deed.

It is sometimes difficult to determine whether a particular document should be stamped as a mortgage or as a document of some other nature. In one case the document purported to be a deed of mortgage with possession by which the owner of certain land, being indebted in a certain sum, conveyed the land to his creditor for nine years in liquidation of the principal and interest of the debt. The creditor was to take the produce of the land, enjoy the profits, or suffer the loss, and pay a certain sum per

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(s) *Shankar Lal v. Sukhrani*, I. L. R. 4 All. 462.

annum as rent. It was held that, although the parties may have understood and described the transaction as a mortgage, it was in fact a sale of a term, or lease for a term of nine years with a reserved rent, in consideration of a premium, the amount of the debt and interest, and the stamp duty leviable was therefore that for a lease with a premium (*t*). Again, in a contract for work to be performed entered into by a contractor with the Executive Engineer of a district, it was stipulated that payments should be made from time to time to the contractor as the work progressed, and that the Engineer might retain 10 per cent. on the value of the work done to cover compensation for default on the part of the contractor and as security for the proper performance of the contract. It was suggested that the contract should be stamped as a mortgage with possession, inasmuch as it amounted to a mortgage of the percentage of which present payment was postponed. But the Court held that this was not so, for the property remained in the Government till the sum necessary to pay the amount retained was paid to the contractor, or at least severed from bulk and assigned for such payment. The contract was an agreement and chargeable with stamp duty as such (*u*).

The principle applicable in the case of a bill of exchange or promissory note, namely, that an endorsement made before the instrument is drawn renders the endorser liable for any amount warranted by the stamp, which may afterwards be filled up upon the face of a bill, is applicable also to the case of a bond pledging by way of mortgage immovable property for securing the amount borrowed. A person entrusted to his man of business a blank paper, duly stamped as a bond, and signed and sealed by him-

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(*t*) *Reference under Stamp Act, sec. 46, I. L. R. 7 Mad. 203. (F.B.).*

(*u*) *Reference under Stamp Act, sec. 46, I. L. R. 7 Mad. 209 (F.B.).*

self, in order that the instrument might be duly drawn up and money raised upon it for his benefit. As the instrument was afterwards drawn up, it pledged by way of mortgage the immoveable property of the obligor as security for the money borrowed, and money was obtained upon it from persons who had no reason to doubt the *bond fides* of the transaction. It was held by a Division Bench of the Calcutta High Court that the pledge of the obligor's immoveable property was valid, and that a suit would therefore lie against his representatives for the realization of the amount of principal and interest due from the mortgaged properties mentioned in the bond (v).

When a District Court has refused to allow the full amount required to make up the proper stamp duty to be paid, on the ground that the document was intentionally executed on an insufficient stamp, for the purpose of evading the law,—the High Court will not in special appeal question the correctness of the finding of the lower Court (w).

Where both the lower Courts (the Court of first instance and the Court which hears the case in regular appeal) hold a document to be insufficiently stamped,—and the person relying on the document does not offer in either Court to remedy the defect by paying the stamp duty and penalty, the High Court will not in appeal allow them to be paid. To do so would be to admit, on special appeal, fresh evidence which the party offering it might have given in the Courts below if he had not persisted in taking a wrong view of the law (x). This was a case under the old Bombay stamp law (Bombay Regulation XVIII of 1827). But it has also been held

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(v) *Wahidunnessa v. Surgadass*, I. L. R. 5 Cal. 39.

(w) *Gambhirmal v. Chejmal*, 10 Bom. H. C. 406; *Ramkrishna Gopal v. Vitlu Shivaji*, 10 Bom. H. C. 441.

(x) *Ramkrishna Gopal v. Vitlu Shivaji*, 10 Bom. H. C. 441.

in Bengal under the Stamp Acts of 1862 and 1869, that an Appellate Court has not, even in regular appeal, authority to direct the reception of an unstamped document upon payment of the amount of stamp duty, and prescribed penalty unless the duty and penalty was tendered when the document was first offered in evidence and rejected (y).

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(y) *Gourpershad Sing v. Lalla Nundlal*, 7 W. R. 439 ; *Champabatty v. Bibi Jibun*, I. L. R, 4 Calc. 213.

## CHAPTER VII.

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### OF THE RELATIVE ESTATES AND DUTIES OF THE MORTGAGOR AND THE MORTGAGEE.

ON the execution of the mortgage, the proprietary right still remains in the mortgagor, even although the possessory right may have passed to the mortgagee.

Whichever party has possession, whether he be the mortgagor or the mortgagee, is in the position of a trustee: he is not the absolute owner of the land, but holds it subject to the rights of the other. The mortgagor must use it as liable to become the property of the mortgagee, and must not do anything that tends to injure or diminish the security on the strength of which he has received the money of the latter (a). The mortgagee in possession must, as a mere trustee for the mortgagor, manage the land according to the best of his ability, regulating the expenses carefully, and applying all the profits to the satisfaction of his claim: and he must take the same care of the estate as he would of his own, and must admit no claim upon it until assured of the title of the claimant (b). The mortgagee is in most cases liable to account for his management: the mortgagor never is so.

The mortgagee's rights are of course always subject to any lien or incumbrance, as a lease or a mortgage, existing prior to the date of his security (c). And he cannot

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(a) *cf.* Sec. 66 of the Transfer of Property Act, 1882.

(b) *Baboo Kunhya Lal v. Syud Dad Alee*, S.D.A. 1859, p. 1273, and *cf.* sec. 76 of the Transfer of Property Act, 1882.

(c) *cf.* Sec. 48 of the Transfer of Property Act, 1882.

repudiate engagements binding the land, previously entered into by the mortgagor (*d*).

Where a mortgagee entitled to possession finds a third party in possession under a mokurreri lease granted shortly prior to the mortgage, and sues to have it declared that the mokurreri was taken in fraud of the mortgagee and therefore is not binding as against him,—the mortgagee as plaintiff must give some evidence to impeach the lease: but if he makes out a good *prima facie* case to impeach the validity of the mokurreri, then the *onus* is shifted and the mokurreridar must prove that the lease was really executed before the mortgage, and *bona fide* for a real consideration and was intended to be operative as against the grantor of the lease (*e*).

But it is only the mortgagor's acts prior to the date of the mortgage which bind the mortgagee. His subsequent acts do not bind the mortgagee unless they are done by him as agent for the mortgagee. Thus where the mortgage recited that the money was raised to enable the mortgagor, who was a member of an undivided Hindu family, to sue his co-partners for partition of the family property and possession of his share therein, which was comprised in the mortgage, and the mortgagor subsequently brought a suit with that object against his co-parceners, but allowed it to be dismissed by default, the Bombay High Court held that, as it was not made out that the mortgagor, in bringing his suit, had acted as the agent of the mortgagee, a suit by the mortgagee for

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(*d*) *Dataram Singh v. Odit Singh*, S.D.A. 1849, p. 341; *Motee Singh v. Mukka Khan*, S.D.A. N.W.P. 1853, p. 515; *Rheeka v. Dhokul Singh*, S.D.A. N.W.P. 1854, p. 366; *Morais v. Gontier*, S.D.A. N.W.P. 1854, p. 585; *Azeem-oollah v. Koondun Singh*, S.D.A. N.W.P. 1855, p. 408.

(*e*) *Shamnarin v. The Administrator-General of Bengal*, 23 W. R. 111 (P.C.).

partition of the same property was not barred (*f*). So also it has been held that a decree given in a suit brought against the mortgagor, declaring that the property pledged was subject to a mokurreri lease in favour of a third party, was not in any way binding upon the mortgagee (*g*); and this case has been followed in a later one, in which it was ruled that a mortgagee not in possession is not barred by a decision, affirming a right of way in a suit between a third party and the mortgagor, from suing for a declaration that there was no such right of way, the mortgagee having had no knowledge of that suit, which was however decided without any collusion between the parties to it (*h*).

A mortgagee who is entitled to possession, has generally a right to have his name registered in the Collector's books as mortgagee, in the place of that of the mortgagor (*i*): and he has a right to appear at a revenue settlement as an objector to the settlement then made, or as a claimant of the settlement.

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(*f*) *Krishnaji Lakshman Rajvade v. Sitaram Murarrav Jakhi*, I. L. R. 5 Bom. 496.

(*g*) *Dooma Sahoo v. Joonarain Loll*, 12 W. R., 362.

(*h*) *Bonomalee Nag v. Koylash Chunder Dey*, I. L. R. 4 Calc. 692.

(*i*) See Ben. Reg. VIII of 1793, sec. 28. This Regulation has been repealed by Act XII of 1876. Section 1 of that Act provides, however, that it shall not affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised or derived by, in, or from any enactment thereby repealed. Whatever may be the effect of that section, Ben. Act. VII of 1876, sec. 44, provides that every person who holds a mortgage of any proprietary right in any estate may apply to the Collector for registration of his name as such mortgagee, and of the interest in respect of which he is such mortgagee, and in such application he is to specify whether he or the mortgagor is in possession.



In a case which came before the Privy Council, the mortgagee had taken no steps to obtain possession or to foreclose, for many years after he might have taken them: and the mortgagor meanwhile sold part of the property to a purchaser whom he put in possession and who got his name substituted in the Collectorate for that of the mortgagor. Their Lordships on this observe: "It may be, and probably is, better that mortgagees keeping their securities locked up in their strong boxes and allowing the mortgagor to be the ostensible owner in possession for a long series of years should occasionally, as in this case, find themselves deprived of portions more or less small of the mortgaged property, than that *bonâ fide* purchasers and persons claiming under them, after many years' possession and possibly much expenditure, should be ousted under a mortgage title perhaps half a century old, because somebody has been paying interest on the mortgage money. In the present case an actual mutation of names took place, and a very slight degree of vigilance would have enabled the mortgagee to assert his title earlier (j)."

When a mortgagee of a "maafee" tenure was no party to resumption proceedings under Act X of 1859, sec. 28, and the land was resumed with the mortgagor's consent, the mortgagee was held to be entitled to question the *bonâ fide* character of the resumption proceedings (k).

A person admitted to settlement as a shareholder, and who continues recorded as lumberdar, may sue to recover his share of the produce of the estate, without first bringing a suit to establish his right to possession. His being so

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(j) *Brojonath Koondoo Chowdry v. Khelut Chunder Ghose*, 14 Moore's I. A. 144 (cf. p. 151); S.C. 8 B. L. R. 104 (cf. p. 109).

(k) *Sheikh Toolun v. Ooman Shunker*, 2 N.W.P. (Agra) H. C. 117.

admitted and recorded, gives him a *prima facie* title to be heard on the merits of his claim (l).

In a pure usufructuary mortgage, the mortgagee has from the first a possessory right: but he never has any thing more, as the proprietary right remains always in the mortgagor. In simple mortgages, no proprietary or possessory right vests in the mortgagee at all, and he is not even in a position which entitles him to appear at a revenue settlement, either as a claimant or in any other capacity (m). In mortgages by conditional sale, the proprietary right, and also the possessory, vest in the mortgagee, when the term fixed for the re-payment of the loan has elapsed, and the process of foreclosure has been completed,—but not till then (n).

An estate was sold for arrears of revenue in 1840 under Ben. Reg. XI of 1822, which was then in force, and a mortgagee in possession sued under sec. 25 of that Regulation to set aside the sale. It was held that his suit would not lie, as a mere mortgagee in possession has no right of ownership, and the Regulation gave the right of action to *proprietors* only (o). “The right of ownership in the mortgaged property does not pass to the mortgagee leaving only the equity of redemption to the mortgagor. The right of ownership, together with the right of redemption, remain with the mortgagor: and until the property be actually foreclosed and the sale become absolute, the right

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(l) *Muhummud Kadir Ulee v. Zamin Ulee*, S.D.A. N.W.P., 1855, p. 494.

(m) *Sheikh Torab Ali v. Qazie Khoda Buksh*, S.D.A. N.W.P., 1853, p. 489.

(n) *Zeinut Begum v. Bheekun Lal*, S.D.A., 1849, p. 392. See also *Russoo Beg v. Thakoor Bhuwanee Singh*, S.D.A. N.W.P., 1855, p. 453.

(o) *Saadut Alee Khan v. The Collector of Sarun*, S.D.A., 1858, p. 840.

of ownership does not pass. The doctrine is equally applicable to conditional sales or usufructuary mortgages: it follows that the mortgagees in the present case who, whatever the nature of the mortgage, were in possession, were simply usufructuaries, and as such enjoyed no right of ownership. Such being the case, the registration of their names incorrectly as proprietors, or the entrance of their names in the sale advertisements as such, when in fact and admittedly they were no such thing, cannot alter the nature of their rights or convert a lower into a higher title. Being as they are usufructuaries, they should, with a view of saving their right, have paid in the revenue and stayed the sale, and they would thus have had an action against the actual proprietors for money paid on their account to protect an interest of the payer in the property."

Where there was an usufructuary mortgage, and the mortgagee, having been ousted, sued to recover possession on the ground of proprietary right,—the Court held that his suit would not lie, as he had no proprietary right, and ought to have sued for possession merely as mortgagee (*p*).

In this connection the question, which has been raised in the N. W. P., whether the term "co-sharer" in the local Revenue law includes a mortgagee of a co-sharer, may be referred to. It was held by the late Sudder Dewany Adawlut of the N. W. P., that sec. 1 of Act XIV of 1863 (the former Revenue law), which referred to suits by *co-sharers* for their shares of the profits of an estate, was sufficiently comprehensive to include "not only actual proprietary co-partners, but all who occupy their places, such as transferees and mortgagees of their rights, who for

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(*p*) *Lochun Singh v. Kessor Konwar*, S.D.A. N.W.P., 1852 p. 5; *Jeorakhun Lall Missur v. Nurul Singh*, S.D.A. N.W.P. 1856, p. 75.

the time "occupy their places" (q). Act XIV of 1863 was superseded by Act XVIII of 1873, but the language of the two Acts, so far as the point in question is concerned, was the same. Nevertheless, a Full Bench of the Allahabad Court was recently equally divided on the question whether the term co-sharer in sec. 93 (g) of Act XVIII of 1873 included a mortgagee of a co-sharer (r). Two of the Judges (*Pearson* and *Oldfield*, JJ.) following the cases above referred to, held that it did, whilst the other Judges (*Stuart*, C.J., and *Straight*, J.) held that it did not, basing their opinion on the ground that a mortgagee has not the full proprietary rights of a co-sharer. As put by *Stuart*, C.J. (s): "a co-sharer is a land-owner, or landholder or proprietor, whereas the interest of a mortgagee, even of a mortgagee in possession, is of a more limited nature. A mortgagee may by foreclosure become possessed of the mortgaged property, but he can never by the direct and unaided effect of his mortgage-right become absolute owner, and unquestionably he has no proprietary right to begin with." It may however be noticed that Act VIII of 1879, which amends Act XVIII of 1873, has removed any difficulty of a similar nature that might arise under that Act in the definition of the term "owner" by defining it to include a lessee, mortgagee, or other person in possession of the land (t).

A somewhat similar question has been raised in Madras also, where it has been ruled that under the terms of Madras Act VIII of 1865 (Rent Act) a mortgagee may

(q) *Baboo Gokul Dass v. Baboo Balmokund*, S.D.A. N.W.P., 1864, vol. 2, p. 592, followed in *Sree Kishen v. Eshree Purtaub Rai*, 2 N.W.P., (Agra) H.C. 299.

(r) *Bhawnni Gir v. Dalmardan Gir*, I. L. R. 3 All. 144 (F.B.).

(s) *Ibid* cf. p. 145.

(t) Act VIII of 1879 s. 11. See also the definition of a "proprietor" in sec. 12.

exercise the powers of a "landholder" under the Act—(1) as a "farmer" if the mortgagor is a landholder of the first of the two classes of landholders defined in sec. 1 of the Act, and if it is a condition of the mortgage that the mortgagee shall take possession of the estate in whole or in part, and give credit or account for a sum certain to the proprietor on account of the collections, or—(2) as an assignee of a landholder if the powers conferred by the Act on landholders have been specially delegated to him by his mortgagor under sec. 79. of the Act. A delegation of powers may be inferred from the general tenor of the instrument and without express terms, but it should not be inferred from an instrument which in form is an ordinary mortgage (*u*).

It is the duty of a mortgagor to take all legal means to protect his rights in the property mortgaged by him: and the mortgagee will be entitled to recover damages for any loss he may sustain through neglect of that duty (*v*).

The Government revenue is a charge upon the land out of which it is payable, and takes precedence of all other claims (*w*). Consequently a mortgage does not in fact pledge anything more than the receipts in excess of the revenue payable in respect of the land mortgaged. It is therefore, *prima facie*, the duty of the person who is in actual possession and registered as proprietor, to pay the Govern-

(*u*) *Vellaya v. Tiruva*, I. L. R. 5 Mad. 76 (F.B.) and *Narayana v. Mukunda*, I. L. R. 5 Mad. 87 (F.B.)

(*v*) *Annundchunder Banerjee v. Soobulchunder Dey*, S.D.A. 1857, p. 1195; *Purlihad Chunder Mujumdar v. Chundeechurn Bhattacharjee*, S.D.A. 1853, p. 575. And *cf.* sec. 65 cl. (b) of the Transfer of Property Act, 1882.

(*w*) With reference to the matters discussed in this and the following paras. compare generally the provisions of ss. 65 cl. (c), 68 cl. (b), 72 cl. (b), 73, and 76 cl. (c) and the last para., of the Transfer of Property Act, 1882.

ment revenue ( $x$ ) : and any loss arising from the neglect of this duty, must be borne by him. Hence, if the mortgagor in possession allows the land to be sold for arrears of revenue, the mortgagee has a lien on any surplus remaining in the Collector's hands after payment of the revenue due ( $y$ ).

So, where a mortgagee obtained a decree against his mortgagor declaring his lien over the mortgaged properties, and the Collector had, previous to the institution of this suit, sold certain of the mortgaged properties, free of all incumbrances, for arrears of Government revenue, and the surplus sale proceeds had been attached by certain creditors of the mortgagor, it was held, in a further suit by the mortgagee against the attaching creditors to have a declaration of his lien over the surplus sale proceeds, that the mortgage decree declaring the lien over all the mortgaged properties\* covered the surplus sale proceeds then in the hands of the Collector, because these moneys must, as between the mortgagee and attaching creditors of the mortgagor, be taken to represent the mortgaged properties ( $z$ ).

If the mortgagee pays the revenue in order to save the estate, he may add the amount so paid to the mortgage debt ( $a$ ). And if property mortgaged by conditional sale remains

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( $x$ ) *Juggutputty Singh v. Rughooburdial*, S.D.A., 1852, p. 678. See also for the similar Bombay law, *Abdul Gani v. Krishnaji Bhikaji*, 10 Bom. H. C. 416, and *Ramchandra Mankeshwar v. Bhimrao Rawji*, I. L. R., 1 Bom. 577. And see for the similar Madras law, *Rajagopalachari v. Subbaraya Mudali*, I. L. R. 7 Mad. 31 (F.B.), though that case was one relating to arrears of rent, which were held to differ from arrears of revenue in not being a charge on the land.

( $y$ ) *Heera Lall Chowdhry v. Janokeenath Mookerjee*, 16 W. R. 222.

( $z$ ) *Kristodass Kundoo v. Ramkant Roy Chowdhry*, I. L. R. 6 Calc. 142.

( $a$ ) *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee*, 11 Moore's I. A. 241. See also *Syed Enayet Hossein v. Muddun Moonee Shahoon*, 14 B. L. R. 155. Act XI of 1859, sec. 9 ; and the same

in the possession of the mortgagor, and is sold for arrears of revenue, the mortgagee can recover from the mortgagor, the balance due to him, with interest,—instead of being left to his remedy against the land alone, as he otherwise would be (b). So, on the other hand, an usufructuary mortgagee, who, being in possession of the mortgaged estate, allowed the Government revenue to fall into arrears during his management, in consequence of which the Collector farmed the property for some time, was held responsible for the profits of the term during which the Collector was in possession (c). And an usufructuary mortgagee has no claim against the mortgagor personally for Government revenue paid by him while in possession, although such payments will be credited to him on adjusting the accounts between them. “The mortgagee has no right of separate action for the amount so paid, while he remains in possession” (d).

But in a recent case decided by the High Court at Allahabad, by the terms of a deed of usufructuary mortgage, the mortgagor accepted the liability on account of any addition that might be made to the demand of the Government at the time of settlement. During the currency of the mortgage tenure, the mortgagees, averring that they had to pay a certain sum

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principles would appear to apply in the case of a payment made by the mortgagee of a patni talook to prevent the sale of the talook for arrears of zemindari rent under the patni sale law, *Mohesh Chunder Banerjee v. Ram Pursono Chowdry*, I. L. R. 4 Calc. 539; see further the remarks of the Full Bench in *Rajagopalachari v. Subbaraya Mudali*, I. L. R. 7 Mad. 31 (cf. p. 35).

(b) *Bulram Sein v. Hurree Churn Shah*, S.D.A., 1848, p. 368.

(c) *Rajah Juggut Singh v. Kasim Ali*, S.D.A. N.W.P. 1848, p. 417; *Syud Kuramut Ali v. Syud Imdad Ali*, S.D.A. N.W.P., 1852, p. 7.

(d) *Musst. Bebee Wuheedun v. Hakeem Abooul Hossein*, S.D.A. 1852, p. 1063. See also *Kunhoochurn Mytee v. Muddun Pundeh*, S.D.A. 1848, p. 346 and *Rajah Doorga Pershad v. Gujadhur Lall*, S.D.A. N.W.P. 1854, p. 378.



in excess of the amount of Government revenue entered in the deed of mortgage, sued the mortgagor to recover such excess. The Court held that, inasmuch as no settlement of accounts was contemplated or was necessary under the provisions of the deed of mortgage, and such deed did not contain a provision reserving the adjustment of any sums paid by the mortgagees in excess of the amount of the Government demand at the time of the execution of such deed to the time when the mortgage tenure should be brought to an end, the suit was not premature and could be entertained (e).

But it is only the revenue which accrues during the time of his possession, that the mortgagee is bound to pay: all arrears fallen due before the date of his entry, remain payable by the mortgagor.

A mortgagee being in possession, the Collector came in and farmed the property, not on account of any fault or mismanagement on the part of the mortgagee, but for an old balance of revenue fallen due before the commencement of his interest as mortgagee. The mortgagee, after a time, came forward and paid up the arrears, whereupon a farming settlement of ten years was granted to him by the Collector. It was held, that the mortgagee was entitled to all the profits during these ten years, without rendering any account to the mortgagor: that he was in no way bound to pay the arrears, and having done so, must be treated as an entire stranger would have been, under similar circumstances (f). However, the Court expressed a doubt whether the Collector acted rightly in admitting the mortgagee in possession of the defaulting mehal, to engagements as farmer by the process of transfer.

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(e) *Nikka Mal v. Sulaiman Sheikh Gardner*, I. L. R. 2 All. 193.

(f) *Syud Kuramut Ali v. Syud Imdad Ali*, S.D.A. N.W.P., 1852, p. 7.

There was a mortgage of a *dur-putnee* tenure, the mortgagee not having possession. The putneedars fell into arrears, and the mortgagee paid the sum due and saved the tenure from sale. It was held that he could not recover the sum so paid from the putneedars, but that he had a good right of action for it as against the *dur-putneedar*, his own immediate mortgagor (g).

If one joint tenant pays the amount of Government revenue due for all, he can recover from the other joint tenants the proportions which it was their duty to have paid. And a mortgagee, being responsible for and having paid the revenue for a whole talook, part of which was in possession of another party by whom the revenue for that part should have been paid, can recover the amount he has paid in excess of his own share, from the person who has made default (h).

But where a sharer had paid the Government revenue for the whole estate, and the persons in possession as co-sharers when the revenue accrued due, were afterwards found to have been wrongfully in possession, and the right as joint tenants was declared by a decree of Court to be in certain other persons, it was held that the latter, who were put in possession under the decree, were not liable in respect of the revenue which had been paid for their shares, because they were not in possession when it accrued due (i).

It has been held that where one co-sharer fails to pay the amount of the Government revenue due on his share and another co-sharer pays the whole revenue in order to save the estate from sale, the latter is entitled to have the sum

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(g). *Annundchunder Banerjee v. Soobulchunder Dey*, S.D.A. 1857, p. 1195.

(h) *Rambux Chittangeo v. Modhoosoodun Paul Chowdhry*, 7 W. R. 377 (F. B).

(i) *Musst. Sonekolee Koonwur v. Sheikh Ezhar Hossein*, S.D.A. 1855, p. 44.

so paid declared to be a charge on the share of his co-sharer even after it has been transferred to a purchaser from him (j). But doubts have recently been thrown on the correctness of the principle contained in this decision in so far at any rate as it is applied to cases in which the co-sharer making the payment has no previous interest in the share which his payment goes to save (k).

A person who *bonâ fide* believed himself to be mortgagee, but who could not prove that he in fact was so (because he could not prove a power of attorney under which the instrument of mortgage purported to have been executed), paid certain sums for Government revenue in order to save the estate from sale. It was held that though he failed to establish his mortgage, the payment he had made was not a merely officious one, and that he was entitled to recover the amount from him whom he believed to be the mortgagor, and for whose benefit he had paid it (l).

If a mortgagee in possession allows the Government revenue to fall into arrear, with a view to the land being put up to sale and his becoming himself the purchaser of it, and he does in fact so become the purchaser of it, such a purchase gives him no absolute title. One who being in possession as mortgagee or trustee, fraudulently obtains the proprietary right, is to be treated as still in the position of trustee, as regards the person defrauded.

This was so ruled by the Supreme Court in a case (m)

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(j) *Syed Enayet Hossein v. Muddun Moonee Shahoon*, 14 B. L. R. 155; see also *Ram Dutt Singh v. Horakh Narain Singh*, I. L. R. 6 Calc. 549.

(k) *Kristo Mokinee Dossee v. Kaliprosono Ghose*, I. L. R. 8 Calc. 402 (cf. p. 419).

(l) *Badaam Koowur v. Lalla Seetul Pershad*, 5 W. R. 126.

(m) *Raja Ojooderam Khan v. Aushootosh Dey*, Supreme Court, 6th July 1852, reported in the "Englishman" newspaper, 8th July 1852; See also *Kelsall v. Freeman*, "Englishman," 4th February 1854.

in which the Judges said : " We continue to hold the opinion we expressed at the hearing, that the revenue laws cannot protect such a transaction as this last : that a mortgagee in possession of an estate and registered as its owner, who properly or improperly suffers that estate to fall into arrear, cannot be allowed to purchase it at a Government sale, to the prejudice of his mortgagor and so as to acquire an irredeemable interest in it. Upon such a purchase a Court of Equity on general principles will fasten a trust, and hold that the mortgagee, subject to the repayment of the amount due on the mortgage, and of his expenses properly incurred, is a trustee for the mortgagor."

The rule thus laid down has been approved of and confirmed by the Privy Council : so that the law upon the subject must now be taken as finally settled (*n*).

More than fifty years after a sale for arrears of revenue, at which sale the mortgagee became the purchaser, the heirs of the mortgagor sued to recover possession on the ground that the relation of mortgagor and mortgagee still subsisted. It was held that as the sale had been unquestioned for fifty years, and as the mortgagor and his representatives if they had used ordinary diligence, could not have remained ignorant of the sale, the suit was barred (under the old law of limitation) in the absence of any special proof of fraud (*o*).

There was a mortgage in the English form, and the mortgagor remained in possession under it. Being so in possession he, for the purpose of defrauding the mortgagee,

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(*n*) *Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan*, 10 Moore's I.A. 540 ; S.C. 5 W. R. (P. C.) 83 ; *Juggut Mohini Dossee v. Mussumat Sokheemoney Dossee*, 14 Moore's I. A. 289 (*cf.* p. 305). S.C. 10 B. L. R. 19 (*cf.* p. 33.) and compare *Jayanti Lakshmaya v. Yerubandi Pedda Appadu*, I. L. R. 7 Mad. 111.

(*o*) *Bykunt Dhur Singh v. Lalla Bhogebut Sahoy*, Marsh. 391.

made wilful default in the payment of Government revenue, and at the sale which was held in consequence, he himself purchased the property *benamee*. The Court was of opinion that such conduct was highly fraudulent, and that the mortgagor had committed a criminal offence under sec. 405 of the Indian Penal Code (*p*).

It has been held that where the agreement is that the mortgagee shall remain in possession of the land until the principal and interest are paid from the profits, the mortgagee is bound to continue in possession so long as there is anything due to him on the mortgage: at least, if he cannot shew good cause for not doing so, he will have no personal claim on the mortgagor for any part of his debt (*q*).

But this is scarcely in accordance with the decision of the Privy Council in an appeal in a case from Bombay. The facts there were as follows. A mortgage of the revenues of a village was executed by the firm of *Lal Kishen*: and the mortgage deed contained a stipulation that the receipts should be applied in liquidation first of interest and then of principal, and that the mortgagees "shall continue so to receive and appropriate the annual produce, until the whole of their demand be liquidated." The deed further provided that the mortgagees should station a clerk of their own in the village to make the collections, who was to receive his monthly salary and daily food from the mortgagors. A clerk was accordingly appointed who received the rents and profits of the village for some years, but afterwards permitted the mortgagors to receive them for four or five years. A was one of the partners of the firm of *Lal Kishen*, and was therefore (though he did not personally execute the mortgage deed) in the position of a mortgagor. The

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(*p*) *Ram Manick Shaha v. Brindabun Chunder Potdar*, 5 W.R. 230.

(*q*) *Musst. Jhanoo Bibi v. Nubokishen Ghose*, S.D.A., 1850, p. 44.

partnership was put an end to, and on arrangement of its affairs the mortgaged estate became the property of partners other than *A*. *A* having got a decree against his late partners for a sum of money which was due to him, proceeded to enforce his claim by attaching the property. Until this attachment, the mortgagees had no notice of *A*'s claims. The Privy Council held (r) that in effect the mortgage deed contained "merely a power (for the mortgagee) to satisfy himself, just as an English mortgagee may, by taking possession of the rents and profits of the estate." Their Lordships observed,—“If an English mortgagee chooses to forego the benefit of receiving the rents and profits, and permits the mortgagor to take them, it would have no effect as between him and the mortgagor. He would have a full right to recover his debt by reason of the mortgage. The only effect would be when some subsequent incumbrancer came in and he had notice of that claim. In that case the rule and law in England would be that if, after notice, he permits the mortgagor to receive the rents and profits, he exposes himself to the claim of the second incumbrancer: and that is the principle which their Lordships think ought to be applied to this case.” Their Lordships go on to say that when *A* proceeded to enforce his claim by attachment, but not before, he became in the position of a second incumbrancer: “and therefore their Lordships are of opinion that though possession was taken by the mortgagee by means of his *mehta* (clerk), and though he might have received the proceeds of the village from 1819 to 1824 or 1825, yet he is not to be charged in account with more than he actually received during that time. But when the attachment was placed on the village, he had notice of an adverse claim, and if after that time he

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(r) *Juggeewan-das Keeka Shah v. Ramdas Brijbookun-das*,  
2 Moore's L. A. 487; S.C. 6 W. R. (P. C.) 10.



permitted the mortgagor to receive any portion of the profits of that estate, then he ought with respect to the monies so received to be postponed to the subsequent incumbrancer. \* \* \* He is to be charged for about two years, during which time he permitted the mortgagors, after the attachment was placed, to receive the rents and profits of the village."

The mortgagee in possession must see to the proper management of the estate, and will be held responsible for any waste or actual damage committed or done by him, and for any deficiency in receipts arising from negligence or misconduct on his part (s). The mortgaged property being a house, the mortgagee in possession ought to keep the premises in repair so far as is necessary for their proper preservation and use: and in accounting he will be allowed all monies properly expended for this purpose, with interest (t). And a mortgagor is entitled to recover damages from his mortgagee, and also from a sub-mortgagee or any other person who has joined in the act complained of, for injury caused to the property by the acts of the mortgagee and others during the time of their being in possession (u). So, he may recover damages for waste committed,—as by the improper cutting down of trees (v). But those only are liable in damages, who have been guilty of the grievance for which redress is sought: and therefore a sub-mortgagee is not liable for damage caused before his entry (w).

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(s) With reference to the matters discussed in this and the following paras., compare the provisions of sec. 76 of the Transfer of Property Act, 1882.

(t) *Jogendronath Mullick v. Raj Narain Paloooye*, 9 W. R. 488.

(u) *Byjnath Pershad v. Sheikh Hyder Ali*, S.D.A. N.W.P., 1852, p. 436.

(v) *Mussumat Asima Beebee v. Sheikh Ahmudee*, S.D.A. N.W.P., 1854, p. 1.

(w) *Byjnath Pershad v. Sheikh Hyder Ali*, S.D.A. N.W.P., 1852, p. 436.



It would seem, however, that a claim for damages for waste cannot, under sec. 111 of the Code of Civil Procedure, be set off against a claim by the mortgagee for the money due under the mortgage. It must apparently form the subject of a separate suit (*x*).

It is the duty of the mortgagee in possession to realise balances due from the cultivators on the estate; and if these balances are lost through his negligence, they will be charged against him in taking the accounts (*y*). He must pay the wages of village chowkidars and putwarees, and all other regular village expenses; these are altogether independent of the will of the mortgagee, and are payments which he, as representative of the owner, is compelled by the orders of Government to make (*z*).

Where the subject of a mortgage is leasehold property, and the mortgagee is put into possession under circumstances which amount to an assignment or transfer of the leasehold interest, the mortgagee becomes liable, as a rule, to pay the rent; but where the mortgagee is in possession and his name is registered in the landlord's books as the tenant, there can be no doubt as to his being liable for the rent (*a*).

Every mortgagee in possession is bound to keep regular and accurate accounts of all sums received and expended by him in the management and preservation of the property, and if he fails to do so, the Courts make it a rule

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(*x*) *Raghu Nath Das v. Ashraf Husain Khan*, I. L. R. 2 All. 252.

(*y*) *Chokey Lall v. Kulean Dass*, S.D.A. N.W.P., 1854, p. 159; *Chowbey Hurbuns Rae v. Chowdree Petum Singh*, S.D.A. N.W.P., 1854, p. 371.

(*z*) *Maharaj Nuwul Kishore Singh v. Syud Inayut Ali*, S.D.A. N.W.P., 1852, p. 248; *Moolchund v. Mussumat Deekoower*, S.D.A. N.W.P., 1852, p. 477; *Chowbey Hurbuns Rae v. Chowdree Petum Singh*, S.D.A. N.W.P., 1854, p. 371.

(*a*) *Kannye Loll Sett v. Nistoring Dossee*, I. L. R. 10 Calc. 443.

to lean against him, and to resolve all doubtful points in favor of the mortgagor (b).

It has been held that a mere usufructuary mortgagee has no right to plant trees on the land held by him under mortgage (c). But this cannot be accepted as a rule applicable to all cases.

The general principle of the English law is that most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of his security, and that many acquisitions by the mortgagee are in like manner to be treated as accretions to the mortgaged property or substitutions for it, and therefore subject to redemption (d). This principle being agreeable to general equity and good conscience is applicable in India. Where, therefore, an Oudh talukdar granted an usufructuary mortgage of a portion of his taluk, in respect of which there existed certain subordinate *birt* tenures, and the mortgagee subsequently acquired these *birt* tenures by purchase, but did not, as he might have done, keep them alive as distinct sub-tenures, but treated them as merged in the taluk, the Privy Council held that the mortgagor was entitled, in a suit for redemption on repayment of the original mortgage debt, and on reimbursing the mortgagee the sum expended in purchasing the *birts*, to re-enter on the estate with all the rights and privileges enjoyed by the latter. At the same time their Lordships refused to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing

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(b) *Sheo Munog Singh v. Syud Khadim Hoossein*, S.D.A. N.W.P., 1855, p. 684; *Ram Kissen Singh v. Shah Kundun Lall*, W. R., 1864, p. 177; *Goluck Chunder Dutt v. Mohun Loll Sookul*, 5 W. R. 271; *Baboo Kullyan Dass v. Baboo Sheo Nundun Purshad Singh*, 18 W. R. 65 (cf. p. 68); and see *post* Chap. X on Accounting.

(c) *Bahadoor Khan v. Kora Mull*, 1 N.W.P. (Agra) H. C. 281.

(d) With reference to this subject compare the provisions of secs. 63 and 70 of the Transfer of Property Act, 1882.

at the date of the mortgage, must be taken to have been made for the benefit of the mortgagor so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption on equitable terms. The decision of each case must depend upon its own peculiar circumstances (e).

A mortgagee of a share in a joint estate has no such right as entitles him to sue for a partition, even although the mortgagor acquiesces in his doing so (f). "The plaintiff has founded his claim on the fact that he stands in the same position as the mortgagor, and therefore that he is at liberty to sue for a division of the estate. The Court agree that in a measure he does stand in the position of the mortgagor, *i.e.*, so far as he is entitled to hold the property in the same manner as he received it from the latter: but they consider that as he has no proprietary right in the estate, he cannot sue for a division of it, the proprietors being alone the persons contemplated by the law, Bengal Regulation XIX of 1814, who are competent to make such an application" (g). And in such a case, the mortgagee seems to be entitled as against the mortgagor to possession only of the portion of the property mortgaged to him, but without disturbance of the title of the *lumberdar* and his position thereunder, and without interruption of the existing fiscal arrangements for the collection of the revenue and general management of the estate (h).

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(e) *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan*, I. L. R. 5 Calc. 198 (P. C.).

(f) But see sec. 44 of the Transfer of Property Act, 1882.

(g) Bengal Regulation XIX of 1814 was repealed by Ben. Act VIII of 1876, which however made no alteration in the law in this respect. See sec. 3, clauses xiii and xiv and sec. 8 *et seq* of that Act.

(h) *Kussoo Beg v. Thakoor Bhuvanee Singh*, S.D.A. N.W.P., 1855, p. 453.

The proprietor of a taluk mortgaged a two annas' share to *B*. Subsequently he sold a five annas' share of the same taluk to *C*, with whom he made a butwara, under which a certain village was registered by the Revenue authorities in *C*'s name, and as representing his five annas' share. The Court held that on the completion of the butwara, *B* lost all lien over the two annas' share of the village made over to *C*, and that thenceforth his lien was limited to such a share of the remainder of the taluk as corresponded with a two annas' share of the whole taluk as it originally stood. As there was no allegation of fraud on the part of the proprietor and *C*, and as the partition was executed under a butwara by the Revenue authorities, the Court was of opinion that the partition must be taken as final and conclusive (*i*).

So the Privy Council have declared it to have been settled by decisions and upon the construction of the Regulations that a mortgagee who has not perfected his title by foreclosure and the consequent decree for possession can neither compel a partition nor be a party to the butwara proceedings. This was in the case of *Byjnath Lall v. Ramoodeen Chowdry (j)*. In that case, the mortgagor mortgaged an undivided moiety of two out of three villages forming a joint and undivided estate: the sharers were not members of a joint and undivided Hindu family, but enjoyed their respective shares in severalty. It was held that the mortgagor had power to pledge his own undivided share in these villages, but that he could not, by so doing, affect the interest of the other sharers in them,—and that the mortgagee took the security subject to the right of those sharers to

(*i*) *Buloram Mahaputier v. Damoodur Mahaputier*, S.D.A., 1857, p. 358.

(*j*) L. R. 1 I. A. 106 (*cf.* p. 120); S.C. 21 W.R. 233. This overrules the case of *Baboo Nishan Sing v. Baboo Jugdeo Sing*, 4 B.L.R. app. 97.

enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. And it was further held that where a butwara is complete under Bengal Regulation XIX of 1814, the mortgagee is entitled to claim, as the subject of his security, that which the mortgagor has received in substitution for the original share mortgaged. It would appear also from this case, that the mortgagee would be bound by the butwara (unless he can set it aside on the ground of fraud), although he neither was nor could be a party to those proceedings (*k*).

An undivided estate was mortgaged to two different mortgagees,—a one-fourth share which belonged to *A* being mortgaged to *X*, and the other three-fourths which belonged to *B* being mortgaged to *Y*. The two mortgagees being in possession got a butwara by the Collector, the mortgagors not being parties. It was held that the mortgagors were not bound by the butwara and could redeem their undivided shares and recover the undivided possession which they had given (*l*).

In a recent case the facts were that *B*, one of the joint owners of certain property, mortgaged his share to *A*, the other joint owner of the property, under a mortgage-deed drawn up in the English form. Later on *A* brought a suit against *B* for partition, and obtained a decree appointing a Commissioner of partition and directing the partition. No return was made to this commission, and no actual partition came to. *A* then obtained a decree on the mortgage for an account, and for payment, or in default for sale of the property, and *B*'s share was eventually put up for sale and purchased by *C*, who was put into possession. *C* then brought

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(*k*) *Byjnath Lall v. Ramoodeen Chowdry*, L. R. 1 I. A. 106 (cf. p. 121.)

(*l*) *Shaiikh Muzhur Hossein v. Hur Pershad Roy*, 15 W. R. 353. This decision was in 1871 before that in the case of *Byjnath Lall v. Ramoodeen Chowdry*.

a suit against *A* for partition. It was contended by *A* that as the estate in question was purchased by *C* pending the partition proceedings, it was still subject to the former decree, and *C* had no right to bring this suit to obtain a separate partition of it. It was held by the Court that though it was possible that the equity of redemption, on the bare right to redeem the property on payment of the mortgage money and interest, which, the mortgage being in the English form, was all that remained in *B* when *A*'s partition suit was brought, might, if it had remained in *B*, have been made the subject of partition in the former suit, still by the act of *A* himself this right had long ceased to exist. The decree obtained by *A* on the mortgage put an end to *B*'s right to redeem, unless he paid the amount found due against him, and therefore at the time of the sale to *C*, *B*'s right to redeem had ceased to exist and the property was no longer subject to partition under *A*'s partition decree, and the partition asked for in the present suit could be granted (*m*).

A creditor may transfer to any third party a sum of money due to him, without previous reference to the person indebted, and without his consent. The transferee may resort to the same measures for the recovery of the amount of the debt, as the original creditor himself might have adopted had the transfer not taken place (*n*).

So, there is no legal impediment to the transfer by a mortgagee of his rights and interests as mortgagee, and his assignee will have in all respects the same rights and liabilities as the mortgagee himself had (*o*). But such a transfer

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(*m*) *Kirty Chunder Mitter v. Anath Nath Dey*, I. L. R. 10 Cal. 97.

(*n*) *Muhummud Hyder v. Ushruff-ool-nissa Begum*, S.D.A. N.W.P. 1855, p. 474; but cf. sec. 131 of the Transfer of Property Act, 1882, for the present law.

(*o*) *Sheikh Mokeem Sircar v. Turee Bibi*, S. D. A., 1848, p. 530; and compare ss. 6 to 8 and s. 65, last paragraph, of the Transfer of Property Act, 1882.

must be without prejudice to the rights of the mortgagor. The mortgagee may put another person in his own position, but he cannot create a title in a third party, distinct from his own (p).

This last rule was given by the Calcutta Sudder Court as one of the grounds on which it decided that the mortgagee cannot, even in exercise of a power expressly conferred on him by the mortgage-deed, sell the mortgaged property to a third person absolutely, on default being made by the mortgagor. As such a power would not enable the mortgagee himself to become absolute proprietor of the land, it was held that for the mortgagee to exercise such a power in favor of a third party, was to create a title distinct from his own, and therefore invalid: and that, as the mortgagee's own title was one which might be made absolute with the aid of the Courts but not otherwise, no higher right than this could be passed by him. The title passed by the mortgagee, however, when he exercises such a power, is not in fact his own right, or any part of it. A conveyance, made by him under the power, is as it were the direct act of the mortgagor, the mortgagee being only the hand by which it is made (q).

The Madras High Court has held that the assignee of a deceased mortgagee is bound by the state of the account between the mortgagor and the representatives of the deceased mortgagee, and is liable in a suit by the mortgagor for damages for breach of contract consisting of a partial failure of payment of consideration by the deceased mortgagee (r).

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(p) *Bhuwanee Churn Mitr v. Jykishen Mitr*, S.D.A., 1847, p. 354; see also *Seedee Nazeer Ali Khan Bahadur v. Rajah Ojoodhya Ram Khan*, 8 W. R. 399.

(q) *Supra* pp. 139 to 148.

(r) *Chinnayya Rawutan v. Chidambaram Chetti*, I. L. R. 2 Mad. 212.



Where the holder of a mortgage agreement had assigned it to a third party, and guaranteed by bond of even date the payment of the principal and interest specified in the agreement, and the assignee had in a separate suit against the mortgagor failed to recover from him the amount of certain interest which the Court held to be due under the agreement, the Court, in a subsequent suit by the assignee against his assignor upon his guarantee bond, ordered the original mortgagor to be made a party, and gave the assignee a decree for the amount of such interest, to be realised in the first instance from the original mortgagor, and in default from the assignor (s).

And the mortgagor may either transfer absolutely, or mortgage his remaining interest in lands which he has already mortgaged, without first redeeming them (t). The purchaser or mortgagee acquires the rights and interests of the mortgagor and stands in his place: he takes the property subject to the lien of the prior mortgagee, the liabilities of the property not being affected by any subsequent transfer which the mortgagor can make. And no act of the mortgagor,—nothing, in fact, but a revenue sale,—can injure the mortgagee's lien on the land, or on that which represents the land (u).

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(s) *Manickya Moyee v. Boroda Prosad Mookerjee*, I. L. R. 9 Cal. 355.

(t) Compare secs. 6 to 8 of the Transfer of Property Act, 1882.

(u) *Luchman Suhai Chowdree v. Gujraj Jha*, 4 W. R. 45; *Bissoonath Singh v. Brojonath Doss*, 6 W. R. 230; *Kishen Bullubh Mukha v. Belasoo Commur*, 3 W. R. 230; *Ubhychurn Sheikhdar v. Joogul Kishore Raee*, S.D.A., 1848, p. 305; *Petition No. 475 of 1849*, S.D.A. 1850, p. 77; *Karoo Lal v. Dataram*, S.D.A., 1857, p. 953; *Baboo Moonna Lal v. Gungapershad*, S.D.A. N.W.P. 1851, p. 32; *Gopal Singh v. Seetul Singh*, S.D.A. N.W.P., 1852, p. 138; *Chowbey Hurbuns Rae v. Chowdhree Petum Singh*, S.D.A. N.W.P., 1854, p. 371; *Ameer-oollah Khan v. Lalmun*, S.D.A. N.W.P., 1854, p. 421; *Bhugwan Doss v. Gopal Singh*, S.D.A. N.W.P., 1856, p. 8; see also *Dinonath Mitter v.*

But conduct amounting to constructive fraud will deprive a prior mortgagee of his right to priority (*v*). Mere silence on his part on hearing that the mortgagor is mortgaging the property a second time, or the mere fact that he attests the execution of the second mortgage deed, where his knowledge of the contents of the deed is not shown, is not such conduct. But where a prior mortgagee attested the execution of the deed mortgaging the property a second time and, being aware of the contents of the deed, kept silence, and thus led the second mortgagee to advance his money on the security of the property, which the Court found he would not have done had he been aware of the existence of the prior mortgage, such conduct was held to amount to constructive fraud on the part of the prior mortgagee and to deprive him of his right to priority (*w*).

Where however there was an equitable mortgage of property situated in the town of Bombay, and the equitable mortgagor mortgaged the property by a legal conveyance to a third party who was a *bond-fide* purchaser for value without notice, the Court, in the exercise of its original jurisdiction, applying the English rule of equity, decided that a purchaser with notice of the equitable mortgage from one who also with such notice had purchased from a *bond-fide* purchaser for value without notice, held the property free from the equitable mortgage (*x*).

A mortgagor, after having hypothecated or pledged certain lands by way of simple mortgage, had a settlement

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*Prosonocoomar Tagore*, S.D.A., 1858, p. 382. And see the general remarks as to the power of alienation possessed by mortgagors in *Venkata v. Kannam*, I. L. R., 5 Mad. 184 (*cf.*, pp. 186-7.)

(*v*) Compare sec. 78 of the Transfer of Property Act, 1882.

(*w*) *Salamat Ali v. Budh Singh*, I. L. R. 1 All. 303; see also the cases referred to in the note to that case on page 303.

(*x*) *Dayal Jairaj v. Jivraj Ratansi*, I. L. R. 1 Bom. 237.

made which divested him, as proprietor, of all his rights, and assigned him a malikana allowance in lieu of his claims. It was contended that not only had the mortgagee no longer any claim on the land, but that the malikana allowance was not subject to his lien. But the Court held, that—"the thing pledged was not changed by the proceedings of settlement, so as to affect the mortgagee's lien, and that the pledge must be regarded as extending to any interest essentially involved in, and arising from, the interests possessed in the property by the debtor at the time of the original transactions; and that the malikana right, assigned to the mortgagor at the settlement, strictly fell within that category" (y).

If a first mortgagee obtains a decree against the mortgagor, declaring the debt a charge on the land, and the land is sold in execution of that decree, but does not realise more than enough to pay off the first mortgage, the auction purchaser has a title to the land free from all incumbrances subsequent in date to the first mortgage (z).

The mere purchase of mortgaged property by a third party does not render him personally liable for the debt, to secure which the land was pledged. The lien on the property under mortgage continues, and the only effect which the purchase has on the mortgagee's position, is that it gives the purchaser, as the mortgagor's "representative," the option of redemption (a).

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(y) *Joolapershad v. Chowbe Hurbuns Rae*, S.D.A. N.W.P., 1853, p. 699.

(z) *Bindrabun v. Ramanuj Bhutt*, S.D.A. N.W.P. 1855, p. 227; *Braraj Kisori Dasi v. Mohammed Salem*, 1 B.L.R. 152; *Gossain Mungul Doss v. Rughoonath Sahoy*, 17 W.R. 560.

(a) *Abadie v. Maxwell*, S.D.A. N.W.P., 1853, p. 316; *Karoo Lal v. Dataram* S.D.A., 1857, p. 953; *Purikhet Khoontya v. Gobind Dass*, S.D.A., 1858, p. 358; *Chutterdharee Koower v. Ramdoolaree Koower*, S.D.A., 1859, p. 1181.

Where a mortgagor has in mortgaging certain lands expressly agreed not to alienate so long as the debt remains unsatisfied,—an alienation made in breach of this agreement has been held to be voidable by the mortgagee, if not absolutely void (*b*). But such alienations are bad only in so far as they interfere with the rights of those with whom the agreement not to alienate was made.

An appeal was admitted, the Judge being of opinion that “the condition of the mortgage (*viz.*, that the mortgagor should not alienate during its continuance), could never be intended to preclude the mortgagors transferring their own proprietary right to a third party, subject to the original mortgage. Of course, possession could not be decreed on such a transfer, til the full amount due to the mortgagee was paid or liquidated from the usufruct.” And this view of the law was afterwards taken by the full Court and the transfer was declared to be valid, subject to the mortgagee’s prior lien (*c*). So, where there was an agreement “not to give a *kut* or permanent pottah,” and that “if any sale, &c., should be made, it should be invalid,” it was held that the mere giving a mortgage by conditional sale of the land referred to, was no infringement of the contract. It was

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(*b*) *Heera Lall v. Rutchpal*, S.D.A. N.W.P., 1851, p. 39; *Mithoo Beebee v. Baboo Madho Pershaud*, S.D.A. N.W.P., 1852, p. 614; *Abadie v. Maxwell*, S.D.A. N.W.P., 1853, p. 316; *Choonnee Lall v. Mirza Fyaz-ood-deen*, S.D.A. N.W.P., 1853, p. 341; *Joalapershad v. Chowbe Hurbuns Rae*, S.D.A. N.W.P., 1853, p. 669; *Mohun Loll v. Ajoodhya Pershad*, S.D.A., N.W.P., 1854, p. 517; *Bindrabun v. Ramanuj Bhutt*, S.D.A. N.W.P., 1855, p. 227; *Chummun Lol v. Kewulnain*, S.D.A. N.W.P., 1855, p. 240; *The Salt Agent of Chittagong v. Ramjeeewun Dutt*, S.D.A., 1848, p. 682; *Baboo Ram Dowur Singh v. Musst. Muhoop*, S.D.A. 1851, p. 482. An agreement in general terms, such as “not to alienate any of my property until the debt has been paid,”—no property in particular being mentioned,—does not constitute a mortgage. See *ante*, p. 138.

(*c*) *Ubhychurn Sheikhdar v. Joogul Kishore Race*, S. D. A., 1848, p. 305; and see *Petition No. 674 of 1853*, S. D. A., 1854, p. 96.

made which divested him, as proprietor, of all his rights, and assigned him a malikana allowance in lieu of his claims. It was contended that not only had the mortgagee no longer any claim on the land, but that the malikana allowance was not subject to his lien. But the Court held, that—"the thing pledged was not changed by the proceedings of settlement, so as to affect the mortgagee's lien, and that the pledge must be regarded as extending to any interest essentially involved in, and arising from, the interests possessed in the property by the debtor at the time of the original transactions; and that the malikana right, assigned to the mortgagor at the settlement, strictly fell within that category" (y).

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however, also said that if the sale were made absolute so as wholly to alienate the property, there would then be a violation of the agreement (d). When in a *sulenamah* there was a stipulation in general terms not to alienate the property, a mortgage made in order to save the estate from permanent alienation was upheld. The debt for which it was mortgaged had been incurred to save it from being sold for arrears of revenue (e).

There was a stipulation in a mortgage deed that until the mortgage debt was paid off, the mortgagor would not sell the property, or that if he did sell it, he would sell it to the mortgagee at a fixed price. The mortgagor subsequently executed a *hibba-bil-uwaz* giving a portion of the property to his wife in lieu of dower. The mortgagee sued to set aside the *hibba-bil-uwaz* as null and void. The Court (f) held that the mortgage deed merely gave the mortgagee a right of pre-emption at a fixed price, in the event of a sale being made, but did not absolutely prohibit the alienation of the property, —and that the mortgagee could only sue to enforce his right of pre-emption. Not having offered to purchase, his suit was dismissed.

The general rule may be said to be that an express stipulation not to alienate mortgaged property until the debt is paid off, does not in equity preclude the mortgagor from transferring his own remaining right, or making a second mortgage,—but such transfer or mortgage will always be subject to the prior mortgage (g).

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(d) *Wise v. Kalinarain Roy*, S. D. A. 1851, p. 477.

(e) *Rajah Ishreepershad Narain Singh v. Rai Tek Lall*, S. D. A. N. W. P., 1851, p. 227.

(f) *Shiva Charun Dass v. Sheikh Roostum*, N. W. P. (Agra) H. C. (F. B.) 69. See also *Dookhchore Rai v. Hajee Hidayut-ool-lah*, N. W. P. (Agra) H. C. (F. B.) 7.

(g) *Roy Kishoree Singh v. Umrit Lal*, S. D. A., 1856, p. 942; *Gungapersaud Singh v. Lalla Beharee Lal* S. D. A., 1857, p. 825.



Thus where in contravention of an express condition not to alienate, the mortgagor transferred his proprietary right in the mortgaged property to a third person by a lease for a term of years,—the mortgagees, having obtained a decree for the sale of the mortgaged property in satisfaction of their claims, sued to have the alienation declared invalid as frustrating the execution of their decree. The Court declined to set aside the lease, but made a declaration that it would not be binding on a purchaser at a sale held in execution of the decree unless he chose to assent to the lease continuing in force (*h*).

In another case decided by the Calcutta High Court, the mortgagor agreed, amongst other things, not to grant in zurpeshgi or mortgage the property to any one, so as to cause any difficulty in the realization of the money advanced under the mortgage bond. The mortgagor subsequently granted a zurpeshgi lease of part of the property. The mortgagee obtained a sale-decree against the mortgagor on his mortgage, and at the sale himself became the purchaser of the property. He then brought a suit against the zurpeshgidar to set aside the lease and obtain khas possession. It was held that the covenant in the mortgage bond merely created a personal liability between the mortgagor and mortgagee, and that the sale under the mortgage decree did not put an end to the zurpeshgi lease or affect the interests of the zurpeshgidar, that the mortgagee's suit against the zurpeshgidar was wrong in form, and that his proper course was to sue to have his right declared to sell the property in satisfaction of his mortgage-debt so as

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(*h*) *Chunni v. Thakur Das*, I. L. R. 1 All. 126; and see the cases collected there at p. 128 [note (1)]. See also *Mul Chand v. Balgobind*, I. L. R. 1 All. 610; *Brajaraj Kisori Dasi v. Mohammed Salem*, 1 B. L. R. 152; *Gossain Mungul Doss v. Raghoonath Sahoy*, 17 W. R., 560.

to give the zurpeshgidar an opportunity of redeeming (i).

And in a recent Allahabad case, *Mahmood, J.*, thus expressed himself on this point (j): "Whilst recognizing the authority of the rulings of this Court above referred to (k), I hold that they do not go to the extent of showing that a mortgagee, having the benefit of a covenant against alienation, can employ it, so as to deprive the mortgagor of the power of dealing with his rights consistently with and subject to the mortgage. I am quite prepared to hold that any alienation by the mortgagor which infringes upon or is capable of doing injury to the rights of the prior mortgagee is not binding upon him, and he may sue to set it aside. But this, in my judgment, follows more from the rule of law than from any express covenant in the mortgage deed. The rights of a mortgagee holding a mortgage with covenant or without covenant against alienation cannot be injured by any act of the mortgagor subsequent to the mortgage, and the mere existence of such covenant cannot entitle the mortgagee to claim rights other than those which are necessary (according to the nature of the mortgage) for the maintenance or enforcement of his security for repayment of the mortgage-debt, the sole object of the contract. I am therefore of opinion that transfers made in breach of covenants against alienation—covenants so often introduced in mortgage deeds and so often infringed by mortgagors in this country—are valid except in so far as they encroach upon the rights of the prior mortgagee, and that, with this reservation, such covenants do not bind the property so as to prevent the acquisition of a valid title by the alienee."

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(i) *Radha Pershad Misser v. Monohur Das*, I. L. R. 6 Calc. 317. And see *Venkata v. Kannam*, I. L. R., 5 Mad. 184 (cf. p. 186), where this case is reconciled with *Chunni v. Thakur Das* above referred to.

(j) *Ali Hasan v. Dhirja*, I. L. R. 4 All. 518 (cf. p. 524.)

(k) *Chunni v. Thakur Das*, I. L. R. 1 All. 126; *Mul Chand v. Balgobind*, I. L. R. 1 All. 610.

An alienation contrary to express agreement cannot be pleaded by the alienor, for the purpose of avoiding his own act. The person whose interests are prejudiced by the alienation can alone put in such a plea or have the transaction set aside (l).

The plaintiffs in a suit sought to charge certain lands with monies due to them. The lands in question had been mortgaged in 1846 to the defendants, and the equity of redemption was sold to them by the mortgagor in 1850. Prior to the sale in 1850, a prohibition against the alienation of the lands in question was, under section 5, Regulation II of 1806, issued at the instance of the plaintiffs. It was held that the rights and interests of the mortgagor in the property attached, as they stood on the date of the issue of the prohibition against alienation, were liable to be sold by the plaintiffs in execution of the decree they had obtained for payment of the debt due to them by the mortgagor (m).

It has been held by the Allahabad High Court, as a result of the doctrine that nothing passes to the auction purchaser at a sale in execution of a decree, but the right, title and interest of the judgment-debtor at the time of the sale (n), that when the holder of a simple mortgage-bond obtains only a money-decree on the bond, in execution of which the property hypothecated in the bond is brought to sale and purchased by him, he cannot resist a claim to foreclose a second mortgage of the property created prior to its attachment and sale in execution of his decree, even when the second mortgage has been created in breach of a condition against alienation contained in the purchaser's prior mortgage (o).

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(l) *Bujrung Singh v. Sheopershad*, S.D.A. N.W.P., 1855, p. 510.

(m) *Suntpertab v. Gibbon*, S.D.A., 1856, p. 67; *Luchman Doss v. Byjoo Naik*, S.D.A. N.W.P., 1856, p. 11.

(n) As to this doctrine see *infra* chap. IX.

(o) *Khub Chand v. Kalian Das*, I. L. R. 1 All. 240 (F.B.); see also *Balwant Singh v. Gokaran Prasad*, I. L. R. 1 All. 433.

In a case where the parties had entered into a transaction, which was held to be one of mortgage, the Court ruled that a condition that the mortgagee would only receive the mortgage money if paid by the mortgagors out of their own pockets, and that if it were raised by transfer of the property he would not receive it, was inequitable and incapable of enforcement against the mortgagors or their representatives in title (*p*).

A mortgage executed subsequent to and pending attachment duly made is void, as against all claims enforceable under the attachment. This is expressly enacted by sec. 276 of the present Code (Act XIV of 1882), but the language of sec. 240, the corresponding section in Act VIII of 1859, was not so plain. It was held, however, by the Privy Council that that section was not to be read in the widest sense, as rendering such an alienation null and void against all the world. It related only to an alienation which would affect the creditor who obtained the attachment—being intended for *his* protection, and not for that of all persons who at any future time might possibly obtain executions (*q*).

Where there is a suit for foreclosure, and the mortgagor, a defendant in that suit, voluntarily sells, pending the suit, part of his interest in the equity of redemption, the purchaser will not be allowed afterwards to institute a new suit for foreclosure (*r*). And one who takes a second mortgage pending a suit by the first mortgagee for a declaration of his lien and sale, has no title as against a purchaser under a decree for sale in the first mortgagee's suit (*s*).

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(*p*) *Ram Saran Lal v. Amirta Kuar*, I. L. R. 3 All. 369 (F. B.).

(*q*) *Anund Loll Doss v. Jullodhar Shaw*, 14 Moore's I. A. 543; S.C. 10 B. L. R. 134.

(*r*) *Anundo Moyee Dossee v. Dhondro Chunder Mookerjee*, 14 Moore's I. A. 101; S.C. 8 B. L. R. 122; see also *Balaji Ganesh v. Khushalji*, 11 Bom. H. C. 24.

(*s*) *Gulabchand Manikchand v. Dhondi valad Bhau*, 11 Bom. H. C. 64; and compare sec. 52 of the Transfer of Property Act, 1882.

So where a creditor obtained a decree against his debtor, and in execution put up for sale and himself purchased certain property of his debtor, which was already under mortgage to another, and such other had, previous to the decree and sale, commenced a suit on his mortgage bond (although such suit had not proceeded to a decree), such judgment-creditor purchasing *pendente lite* only obtained the right and interest of the mortgagor in such property, *viz.*, the equity of redemption, and did not acquire the property free from the incumbrance created by the debtor (*t*).

And where the purchaser of certain property under a money decree purchased with notice that another person held a decree enforcing a lien on such property, and the property was subsequently purchased under that decree by a third party, who sued the purchaser under the money decree to recover possession of the property, it was held that inasmuch as under Act X of 1877, which governed the case, what is sold in execution of a decree purports to be the specific property, and not merely (as under Act VIII of 1859) the right, title and interest of the judgment-debtor in the property sold, and as the defendant had purchased the property with notice of the existing lien on it, and subject to its resale in execution of the decree in execution of which the plaintiff had purchased it, what actually was sold in execution of that decree to the plaintiff was the property, and the plaintiff was entitled by virtue of his purchase to possession of the property (*u*).

Nor can a purchaser under a money decree against the mortgagor, pending a suit by a mortgagee for the specific performance of the contract of mortgage, defeat the mortgagee's right to bring the property to sale in satisfaction of his debt, and the presentation of an award empowering the

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(*t*) *Lala Kali Prosad v. Buli Singh*, I. L. R. 4 Calc. 789.

(*u*) *Sheo Ratan Lal v. Chotey Lal*, I. L. R. 3 All. 647 (F. B.).

mortgagee to sell the property in satisfaction of his debt is equivalent to such a suit (*v*).

But an alienation by a mortgagor *pendente lite* is not always postponed to a purchase under the pending suit. The suit must have been such that the alienee can be taken to have anticipated that the order under which the property was sold would be made. Thus where the defendant's purchase was made in a suit which was pending long before the date of the mortgage under which the plaintiff claimed, but the Court found that the mortgagee could not, at the time that he took his mortgage, have anticipated that the order, directing the sale of the particular property to which his mortgage related, would be made, it was held that neither the mortgagee nor the plaintiff claiming under him was bound by the subsequent order for sale in the suit, and his mortgage was, therefore, entitled to take precedence of the defendant's purchase in that suit (*w*).

Nor will the doctrine of *lis pendens* hold good where the alienation was not by the mortgagor, but by the Court, acting on behalf of creditors against the mortgagor, and where the process of sale, or at any rate proceedings with a view to the sale of the property had commenced before the suit was instituted. Thus where the defendants had purchased the property in question, subsequent to the plaintiff's mortgage suit, under certain *fi-fa* proceedings which had been commenced previous to the institution of the plaintiff's mortgage suit, though subsequent to the making of the plaintiff's mortgage, it was held in a suit by the plaintiff, who had purchased the property under the decree given in his suit, for possession thereof, that the purchase by the defendants was not affected by the plain-

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(*v*). *Pranjivan Govardhandas v. Bajju*, I. L. R. 4 Bom. 34.

(*w*) *Kasumunnissa Bibee v. Nilratna Bose*, I. L. R. 8 Calc. 79 ; see also *Kailas Chandru Ghose v. Fulchand Jaharri*, 8 B. L. R. 474.

tiff's mortgage suit as a *lis pendens*, and therefore that the plaintiff was not entitled to ignore that purchase and to hold the property free from any right which the defendants acquired by their purchase (x).

The fact of there being an existing mortgage over lands, in no way prevents the right and interest of the mortgagor from being sold in execution of a decree against him (y). And an execution creditor should attach those rights and interests, notwithstanding their being incumbered. If he does not do so, but remains content with a temporary arrangement such as an assignment of the rents of the estate, the mortgagor's rights may be sold and applied in satisfaction of the debt of any other decree-holder, who may afterwards come and attach them.

A judgment creditor, instead of attaching the remaining rights of his debtor who had mortgaged certain property, merely applied to the Court for an assignment of the rent payable to the debtor by the lessees of that property; and these rents were accordingly paid to him, so long as the lease lasted. Another judgment creditor had his debtor's rights as mortgagor put up for sale, in satisfaction of his decree. It was held that the first creditor, having chosen to rest satisfied with the assignment and by his own laches allowed the rights of the mortgagor to get into the hands of another, had lost his remedy as against those rights, and that he had no claim against the second judgment creditor or against the estate which had passed into his hands under the sale in execution of his decree (z).

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(x) *Chunder Nath Mullick v. Nilakant Banerjee*, I. L. R. 8 Calc. 690.

(y) See *Karoo Lal v. Dataram*, S.D.A., 1857, p. 953; *Sheobuksh Singh v. Sheochurnlal Sahoo*, S.D.A., 1858, p. 498; *Woomasoonderee Debea v. Chowdhry Rughonath Dass*, S.D.A., 1860, vol. 2, p. 35.

(z) *Baboo Hurruck Chund v. Mohamed Hossein*, S.D.A. N.W.P., 1853, p. 372.



Only those rights and interests which remain to the mortgagor can be sold, and the sale of them in no way affects the mortgagee or his lien. A purchaser at a sale in execution of a decree takes only what the person whose rights are sold has to give; and his acquisition is subject to all the conditions and incidents under which it was held at the date of the attachment (a). Where therefore certain property was attached in execution of a decree and the judgment-debtor applied for and obtained a rehearing of the case, and on the rehearing the first decree was set aside, and a second decree passed in a modified form under which the property was again attached, it was held that the purchaser at the execution sale under the second decree took the property subject to a mortgage of it, which the judgment-debtor had granted subsequent to the attachment under the first decree, but before that under the second (b). But, the question being whether the possession of one who had, without notice of a prior mortgage, purchased at a sale in execution of a decree obtained by a third party against

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(a) *Rajah Enayet Hossain v. Girdharee Lall*, 12 Moore's I. A. 366; S.C. 2 B. L. R. (P. C.) 75; *Brindabun Chunder Roy v. Tara-chand Bundopadhyay*, 11 B. L. R. 237; *Lalla Joogul Kishore Lall v. Bhukha Chowdhry*, 9 W. R. 244; *Sheo Lall v. Laljee*, S.D.A. N.W.P., 1854, p. 399; *Kunhya Singh v. Mussumat Sobhnath Koor*, S.D.A. N.W.P. 1854, p. 559; *Baboo Balmukund v. Baboo Jankee Dass*, S.D.A. N.W.P.; 1854, p. 562; *Bhugwan Doss v. Gopal Singh*, S.D.A. N.W.P., 1856, p. 8; *Baboo Rughoonath Suhay v. Brijbeharee Lal*, S.D.A. 1857, p. 486; *Karoo Lal v. Dataram*, S.D.A., 1857, p. 953; *Sheobuksh Singh v. Sheochurnlal Sahoo*, S.D.A. 1858, p. 498; *Prosunnoocomar Muzoomdar v. Kalichunder Chowdhry*, S.D.A., 1860, vol. 2, p. 250; and see the proposition laid down in *Janoky Bullabh Sen v. Johiruddin Mahomed Abu Ali Soher Chowdhry*, I. L. R. 10 Calc. 567 (cf. p. 571). See also *Stowell v. Ajudhia Nath*, I. L. R. 6 All. 255.

(b) *Radhanath Kundu v. Land Mortgage Bank of India, Limited*, I. L. R. 6 Calc. 595.

the mortgagor, was possession adverse to the mortgagee,—the Privy Council held (c) “that the title of a judgment creditor or a purchaser under a judgment decree cannot be put on the same footing as the title of a mortgagor or of a person claiming under a voluntary alienation from the mortgagor;” and that the possession of a purchaser under such circumstances is really not the possession of a person holding in privity with the mortgagor, or so holding as to be an acknowledgment of the title of the mortgagee,—for in the absence of notice of the mortgage, the possession which the purchaser supposed he acquired was a possession as owner.

A purchaser at a sale in execution of a decree is entitled to all the rents due on the date of sale, or falling due afterwards. But he cannot recover from the former proprietor arrears of revenue fallen due before the sale, which the purchaser has been obliged to pay in order to prevent the estate from being sold by Government (d).

In 1871 the mortgagee of certain property, styling himself the owner of it, mortgaged it to the plaintiff. In 1875 the mortgagee became the owner of such property by purchase. In 1877 the property was put up for sale in execution of a decree against the mortgagee, and purchased by the decree-holder, who was aware of the true state of the property. In a suit by the plaintiff against the mortgagee and the auction purchaser to enforce his mortgage, it was held that, inasmuch as if the plaintiff had at any time sued the mortgagee to enforce his mortgage after he had become the owner of the mortgaged property and before the auction purchaser had purchased it, the mortgagee would have been estopped from denying the validity of such mortgage, and as there was nothing fraudulent in such mortgage, and

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(c) *Anundo Moyee Dossee v. Dhonendro Chunder Mookerjee*, 14 Moore's I. A. 101 (cf. p. 111); S.C. 8 B. L. R. 122 (cf. p. 127); *Musst. Imrit Koor v. Lalla Debee Pershad Singh*, 18 W. R. 200.

(d) *Sheogolam Singh v. Bhageerut*, S.D.A. N.W.P., 1854, p. 344.

the auction purchaser had purchased with a knowledge of the facts, after the mortgagee had become the owner, the auction purchaser was estopped from denying the validity of such mortgage, and the mortgaged property was liable in his hands to the plaintiff's claim (e).

An usufructuary mortgage was granted, by way of lease, two years being the term given for repayment, there being also a stipulation that, after the lapse of that time, the mortgagee might hold on, until his claim was satisfied. It was held, that until the mortgage debt was paid, the mortgagee was entitled to possession, both before and after the expiry of the term of two years, even against a decree-holder (f).

A first mortgagee being lawfully in possession under his mortgage, a second mortgagee got (as he was entitled to get) a decree for the sale of the property, but subject to the rights of the prior mortgagee. It was held that the second mortgagee had no right, in execution of this decree, to enter on the property and take actual possession through the bailiffs of the Court or otherwise. His proper course was to issue a prohibitory order under the 235th and 239th sections of the former Code of Civil Procedure (Act VIII of 1859) (g). And it has been held that a mortgagee in possession of mortgaged premises which have been attached by a prohibitory order under section 235 of that Code in execution of a decree against his mortgagor, was entitled to come in under sec. 246 and claim to have the attachment removed (h).

(e) *Seva Ram v. Ali Bakhsh*, I. L. R. 3 All. 805; and compare sec. 43 of the Transfer of Property Act, 1882.

(f) *Girdharee Lal v. Musst. Kadira*, 6 Sel. Rep. 175.

(g) *Mudhun Mohun Doss v. Gokul Doss*, 10 Moore's I. A. 563; S.C. 5 W. R. (P.C.) 91. Sec. 274 is the corresponding section of the present Code (Act XIV of 1882).

(h) *Kassirav R. Sahab Holkar v. Vithaldas Mangalji*, 10 Bom. H. C. 100. Secs. 278 to 281 of the present Code (Act XIV of 1882,) correspond with sec. 246 of Act VIII of 1859.

When there is a stipulation that the mortgage debt shall be paid off on a day named, a sale of the property in execution of a decree against the mortgagor, does not diminish or affect the lien of the mortgagee, who consequently is not entitled to sue the mortgagor personally for the recovery of the debt, before the day fixed by the contract (i).

A mortgagee ought not, however, to remain quiet at the time of a sale of the mortgagor's rights and interests; but should give notice of his lien (j): and the existence of his claim should be made known to the bidders by the officer conducting the sale.

Where the holder of a mortgage, which was neither registered nor accompanied by possession obtained a money decree against his mortgagor, but not in respect of his mortgage, and in execution of that decree caused the mortgaged property to be attached and sold to a person, who had no notice of the mortgage, or that the sale was made subject to the mortgage, it was held that it was incumbent on the holder of the mortgage, the judgment-creditor, to inform the purchaser, when bidding for the right, title and interest of the judgment-debtor in the mortgaged property, that he, the judgment-creditor, held a mortgage on the same property and intended to enforce it, and further that the judgment-creditor having omitted so to inform the purchaser was estopped from enforcing his mortgage against the purchaser (k).

A mortgagor impliedly warrants his title to the property which he mortgages: and if the title is defective, the mort-

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(i) *Busraj v. Achybur Tewaree*, S.D.A. N.W.P., 1848, p. 209.

(j) *Hajee Mohamed Imam Buksh v. Rai Butuk Lall*, S.D.A. N.W.P., 1850, p. 3; see also *ante*, p. 269.

(k) *Tukaram bin Atmaram v. Ramchandra bin Budharam*, I. L. R. 1 Bom. 314.

gagee can sue for damages for the breach of contract though there be no express agreement as to title (l).

It is the duty of a mortgagor who has covenanted to put the mortgagee into possession, to do so at once, and to secure his quiet enjoyment of possession during the term agreed upon. And a mortgagor who refuses or is unable to give and to secure possession to an usufructuary mortgagee, renders himself liable to an immediate action for recovery of the money advanced, with interest (m).

There was an usufructuary conditional sale: the mortgage money was not repayable until the lapse of twenty years, but the mortgagee was to have possession from the date of the mortgage. Possession was withheld, and the mortgagee sued to recover the money lent by him with interest. It was held that the mortgagee was entitled to recover at once, without waiting till the end of the twenty years (n).

A mortgage by way of lease was granted, the condition being that the farm should continue in force until the money was repaid. Previous to payment, the mortgagor ejected the mortgagee: and the Court held that the latter might sue the mortgagor for the money, and was not restricted to a suit for possession. The mortgagor having committed a breach of contract, could not enforce fulfilment from the mortgagee of what was to be performed on his part (o).

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(l) *Dwarika Dass v. Ruttun Singh*, 2 N.W.P. (Agra) H.C. 199. Compare sec. 65 cl. (a) of the Transfer of Property Act, 1882.

(m) See sec. 68 cl. (c) of the Transfer of Property Act, 1882.

(n) *Raja Oodit Parkash Singh v. Martindell*, 4 Moore's I.A. 444; *Premnath Ghose v. Kalee Pirshun Puramanick*, S.D.A., 1856, p. 849; *Lalla Matadeen v. Hooluim Singh*, S.D.A. N.W.P., 1860, p. 280.

(o) *Amatool Hosnain Begum v. Syed Ahmud Alee Khan*, S.D.A., 1852, p. 193; *Anundmaje Dassea v. Ranees Jadoomonee*, S.D.A., 1853, p. 59; *Ablak Bhukut v. Narain Gossaein*, S.D.A., 1858, p. 306. See also *Solano v. Musst. Roop Kooar*, S.D.A., 1859, p. 58; *Doollubh Bhutt v. Hurrokishen Mytee*, S.D.A., 1859, p. 322.

In a case, which has been already referred to, of mortgage by conditional sale, the mortgaged lands were, prior to the date at which the loan was repayable, sold under a decree as belonging to a third party. The mortgagor unsuccessfully asserted his rights in the summary sale proceedings, but took no further steps to protect the mortgagee. It was decided that as the mortgagor had neglected the duty which lay upon him of preserving his rights for the mortgagee, the latter was entitled to sue to recover the money he had advanced, and was not bound to enforce his claim against the land (*p*).

When the agreement was that the mortgagee should be put in possession and repay himself from the usufruct, and the mortgagor prevented his getting possession and evaded having his name registered in the Collector's books, this was held to entitle the mortgagee to sue for his money instead of for possession (*q*).

It would seem that if the mortgagee is deprived by diluvion of the possession of land of which he holds an usufructuary lease, before he has been repaid what is due to him, he has a right, in the absence of express agreement to the contrary, to recover from the mortgagor the unpaid balance of the mortgage debt (*r*). So where a house was mortgaged—the usufruct to be in lieu of interest,—and the house was burnt while the mortgagee was in possession, the Bombay High Court held that as the house perished by accident and without negligence on the part of the mortgagee, he was, in the absence of any special agreement

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(*p*) *Purlihad Chunder Mujumdar v. Chundeechurn Bhuttacharjea*, S.D.A., 1853, p. 575; and *cf.* sec. 68 cl. (b) of the Transfer of Property Act, 1882.

(*q*) *Seetul Sah v. Net Singh*, S.D.A. N.W.P., 1853, p. 286; see also *Babu Gopal Doss v. Charles Hollier*, S.D.A. N.W.P., 1856, p. 115; *Chutterdharee Koower v. Ramdoolaree Koower*, S.D.A., 1859, p. 1181.

(*r*) *Sheo Golam Singh v. Roy Dinker Dyal*, 21 W. R. 226; but compare sec. 68 (last paragraph) of the Transfer of Property Act, 1882.

to the contrary, entitled to sue the mortgagor for the mortgage debt (s).

The plaintiff borrowed Rs. 1,400 from the defendant, and mortgaged to the latter for a term of eight years a piece of ground with a warehouse standing thereon which he placed in the possession of the defendant. There was an agreement between the parties that the rent of the warehouse should be Rs. 16-12 per mensem, and that out of this amount the defendant should appropriate Rs. 14 towards the payment of the interest on the principal sum, and pay Rs. 2-12 as rent to the plaintiff. Within four years from the date of the mortgage the warehouse was destroyed by fire, and thereupon the defendant ceased to pay rent to the plaintiff. The Madras High Court dismissed a suit by the latter to recover the site together with arrears of rent. It was held that the transaction between the parties was really an usufructuary mortgage, the terms of which were that out of the rents and profits of the mortgaged property equivalent to Rs. 16-12, the mortgagee was to apply Rs. 14 in discharge of the mortgage, while Rs. 2-12 was to be received by the mortgagor from the mortgagee. The destruction of the mortgaged premises, which had arisen from accidental causes, did not affect the mortgagee's right to recover the full amount due to him on the mortgage. There was no alteration in the liability of the mortgagor to discharge his debt, but merely in the source and mode of discharge. As to the surplus payment, the premises having ceased to exist, nothing arising from the income could be credited to the mortgage, and there was no residue available to pay the plaintiff (t).

In one case the mortgagee had possession, by deed of *burna*, in security for a loan. The terms of the deed were

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(s) *Vithoba valad Ukba v. Chotalal Tukaram*, 7 Bom. H. C. (a. c. j.) 116.

(t) *Venkateshwara v. Kesava Shetti*, I. L. R. 2 Mad. 187.



such that so long as the estate remained bound by the mortgage, the mortgagee could look no further than the estate and the convenience of the mortgagor for the discharge of the debt. The property was sold for arrears of Government revenue, and the mortgagee consequently lost possession. The sale for arrears left surplus proceeds which were claimed by and paid to a third party who held a decree against the mortgagor. The mortgagee then sued this third party for the surplus proceeds paid to him, on the ground that they represented the mortgaged estate and were bound by the mortgage. But it was held that until the mortgagee obtained a decree against the mortgagor he had no more right to the surplus proceeds or other assets belonging to the mortgagor than any other ordinary creditor had (*u*). If in execution of a decree of Court, mortgaged lands are sold subject to the mortgage, the mortgagee is not entitled to share in any surplus (*v*).

During the term of a *zur-i-peshgee* lease, the mortgagee was ejected by one who had, at a sale in execution of a decree, purchased the right and title of the mortgagor in the property. It was held that the mortgagee was not entitled to sue the ejector for the money secured to him by the *zur-i-peshgee* lease,—and that his only remedy was by a suit to recover possession or for damages, as the purchaser who ejected him was not privy to the contract between the mortgagee and mortgagor (*w*).

Where a mortgagee had been ousted from possession of portion of the property mortgaged to him in consequence of the fraud of the mortgagor, who had sold the property to a third party previous to the mortgage, it was held that the mortgagee was entitled to compensation for the loss of the rents

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(*u*) *Mussumut Mondwa Koonwar Beebe v. Baboo Behareelall Panday*, S.D.A., 1860, vol. 2, p. 38.

(*v*) Act VIII of 1859, sec. 271.

(*w*) *Shaik Shamdanee v. Bhojoo Ram*, 22 W. R. 44.

and profits which he ought to have received in lieu of interest (x). But where there was no deception, but the mortgage deed informed the mortgagees that a portion of the land assigned to them as security was held by the mortgagor, not as owner, but as mortgagee, and they were, therefore, well aware that the mortgage to the mortgagor was liable to be redeemed, the Court refused to allow the mortgagees compensation for the loss of this portion of the mortgage property, which was taken out of the mortgagees' possession by the original owners, who redeemed it from their mortgagor (y).

If it is the expressed intention of the parties, that the land, and the land only, shall be the source from which the mortgagee is in any event to be paid, he must in the first instance bring his suit for possession. The terms of a mortgage deed were, that the surplus proceeds of a certain taluk should be applied to the extinguishment of the mortgage debt, "and that in the event of the non-fulfilment of this condition, the mortgagee *might sue to obtain possession of the estate.*" It was held that the mortgagee could only avail himself of the remedy expressly provided for him in his deed, and must sue for possession (z). In another case the mortgagee, who was put in possession, was to keep a certain portion of the yearly usufruct in lieu of interest, and this he was to continue to do, until the mortgagors came forward and paid off the principal in one sum. The mortgagee, after being in possession some years, voluntarily gave it up and brought a suit on his mortgage,

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(x) *Special Appeal* No. 22 of 1875, unreported, but referred to in *Dhondo Ramchandra v. Balkrishna Govind Nagvekar*, I. L. R. 8 Bom. 190 (cf. p. 193).

(y) *Dhondo Ramchandra v. Balkrishna Govind Nagvekar*, I. L. R. 8 Bom. 190.

(z) *Rajah Isreepurshad Narain Singh Bahadoor v. Rae Ghirodur Lal*, S.D.A. N.W.P., 1848, p. 18.

for principal and interest. It was decided that so long as he received the specified sum from the usufruct, he had no right to complain, or to ask for his principal, until such time as the mortgagor chose to pay it off. It was, however, observed that if he had been dispossessed while anything was yet due to him on the mortgage, he would have had a right to claim to be restored to the estate or to sue without further delay for the cash payment, whichever he preferred (a).

There was apparently a pure usufructuary mortgage, the agreement being that the mortgagee should have possession until payment: but the money was not paid, nor did the mortgagee get possession. He therefore brought a suit for possession, and for the interest of his money during the time he had been kept out. The Court ruled that the conditions of the deed showed that the mode of payment selected and stipulated for by the parties was payment from the usufruct, and that the mortgagee's claim for interest was not in accordance with the terms of the deed, and must be rejected (b).

A second mortgagee, under a mortgage, which stipulated that, if the mortgage money was not repaid within a fixed time, the mortgagee should be put into possession of the property, not receiving payment within the stipulated time, sued the mortgagor on his mortgage and obtained a decree for possession of the property, under which he was put into possession,—the first mortgagee, the holder of a like mortgage, then obtained a like decree on his mortgage, under which he also obtained possession, dispossessing the second mortgagee. Subsequently the heirs of the mortgagor paid off the debt due to the first mortgagee and obtained pos-

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(a) *Syud Mohumed Hossein Khan v. Thakoor Sheo Golam Singh*, S.D.A. N.W.P., 1848, p. 331.

(b) *Pohpee v. Cheda Lal*, S.D.A. N.W.P., 1848, p. 211.

session of the property. In a suit by the heirs of the second mortgagee against the heir of the mortgagor for possession of the mortgaged property, and for interest during the time they were dispossessed, the Privy Council held that the plaintiffs were entitled to possession when the first mortgage was paid off, and that their cause of action ceased and limitation ran against them from the time when the heirs of the mortgagor resumed possession, but that they were not entitled to a decree for interest during the time they were dispossessed, the question of interest being one which should remain open until the mortgagors sought to redeem the land (c).

Where the usufructuary mortgagee of a family, governed by the Alyasantana law, obtained a decree for possession of the land mortgaged against the manager and two other members of the family, and for payment of mesne profits from the date of the mortgage against the manager only, it was held that he was not entitled, after the death of the manager, to execute the decree for mesne profits against the family (d).

The question was raised whether a mortgagee by usufructuary conditional sale, who had never got possession of the property, could foreclose the mortgage, he having refused to accept a tender of the principal sum due, on the ground that he was also entitled to interest for the time during which the usufruct was withheld from him. The Court expressed an opinion, "that if he did not obtain the possession stipulated for, it was open to him to bring a suit to enforce fulfilment of the contract, but he was not at liberty to forego this right, and to demand interest in lieu thereof, contrary to the express terms of the contract" (e).

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(c) *Narain Singh v. Shimbhoo Singh*, I. L. R., 1 All. 325 (P. C.).

(d) *Venkata Krishnayyar v. Kaveri Shettati*, I. L. R. 7 Mad. 201.

(e) *Bama Singh v. Munnoolal*, S.D.A. N W.P., 1853, p. 441.

In like manner any deviation by the mortgagee from the terms of his contract, entitles the mortgagor at any time to have it cancelled and to pay off his debt.

A mortgage agreement, in the form of an usufructuary conditional sale, provided that certain arable and orchard lands, portion of the mortgaged property, should continue in the possession of the mortgagor. The mortgagee, during the continuance of the mortgage term, took possession of some of the reserved orchard lands. It was held that this was such a breach as entitled the mortgagor at once, and without waiting for the day of payment originally agreed on, to cancel the mortgage contract and recover possession of the whole mortgaged property, on paying into Court the full amount of the loan. And his right to do so was not affected by the fact that it was not expressly given to him by the mortgage deed (f).

But a mortgagor has no right, even where the mortgage and possession under it have been fraudulently obtained by the mortgagee, forcibly to dispossess the mortgagee. The mortgagor's remedy is by way of suit to have the mortgage set aside and possession restored to him (g).

A question of priority having arisen between two mortgagees,—the *second* claiming priority on the ground that with his mortgage he obtained possession of the title-deeds—the Madras High Court held that the non-possession of the title deeds by the first mortgagee was a circumstance calling for explanation, but that if he could satisfy the Court that the absence of the title deeds was reasonably accounted for to him at the time when he obtained his mortgage, or that he was subsequently induced to part with them upon such grounds and under such circumstances as

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(f) *Manoo v. Sheikh Kadir Buksh*, S.D.A. N.W.P., 1855, p. 223.

(g) *Sayaji bin Nimbaji v. Ramji bin Langapa*, I. L. R. 5 Bom. 446.

to exonerate him from any serious imputation of negligence, his priority would not be lost because the mortgagor afterwards dishonestly handed over the deeds to a second mortgagee (*h*).

There was formerly some conflict of opinion between the various High Courts as to the position of a prior incumbrancer, who has purchased the right and title of the mortgagor, with respect to subsequent incumbrances (*i*). To such cases the High Courts of Bengal and Bombay applied the English doctrine laid down in *Toulmin v. Steere* (*j*), viz., that the purchaser of an equity of redemption with notice of subsequent incumbrances stands in the same position as regards such subsequent incumbrances as if he had been himself the mortgagor, and cannot set up as against such subsequent incumbrances, either a prior mortgage of his own, or a mortgage which he or the mortgagor may have got in (*k*). The Madras High Court, however, deliberately rejected this doctrine, and adopted instead the doctrine of the Roman law under which a prior mortgagee having purchased may still use his mortgage as a shield against the claims of subsequent mortgagees (*l*).

But as shown by *West, J.*, in his recent judgment in the Full Bench case of *Mulchand Kuber v. Lallu Trikam* (*m*), the doctrine laid down in *Toulmin v. Steere* has been very much qualified by the decisions of later years in England, and the

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(*h*) *Somasundara Tambiran v. Sakkarai Pattan*, 4 Mad. H. C. 369.

(*i*) With respect to the subject here discussed, see sec. 101 of the Transfer of Property Act, 1882.

(*j*) 3 Merivale 210.

(*k*) *Gournarain Mozoomdar v. Brojonath Koondoo Chowdhry*, 14 W. R. 491; *Itcharam Dayaram v. Raiji Jaga*, 11 Bom. H. C. 41; see also the unreported decision of the High Court N. W. P. in S. A. No. 159 of 1876, referred to by *Oldfield, J.*, in his judgment in *Gaya Prasad v. Salik Prasad*, I. L. R. 3 All. 682 (*cf.* p. 687).

(*l*) *Ramu Naikan v. Subbaraya Mudali*, 7 Mad. H. C. 229.

(*m*) I. L. R. 6 Bom. 404 (*cf.* p. 409 *et. seq.*).

principle now followed would seem to be that, if an intention to keep the mortgage alive can be gathered from the circumstances of the case, even though it has not been expressly stated the mortgage will be deemed to remain alive. As stated by *Jessel*, M. R., in a recent case (n): "In a Court of Equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it has been extinguished. \* \* \* The person paying off a charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of intention, destroy it; but if there be any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it."

It was, therefore, held by the Bombay Court in the case above quoted that a first mortgagee who had purchased the equity of redemption could not be supposed to have intended to part with his money or his right to money, merely in order to make a present to his puisne incumbrancer, but rather to retain the benefit of all his rights, and therefore he, as represented by his son, might properly require the redemption of his own first mortgage as the condition of the puisne incumbrancer enforcing the decree on his mortgage against the property.

And this ruling was followed by a Division Bench of the same Court in a later case where the purchase was one not from the mortgagor himself, but at a Court sale, and where, therefore, there could have been no agreement between the mortgagor and the purchaser that the mortgage should merge, nor any restoration of the mortgage deed to the mortgagor, and it was held that the circumstances of the mortgage-deed remaining with the

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(n) *Adams v. Angell*, L. R., 5 Ch. D. 634. (cf. p. 645.)



purchaser was evidence that he intended to retain the benefit of the mortgage (o).

And similar principles would seem to have been adopted by the Allahabad High Court in recent cases. It has been held by that Court that when it is the manifest intention of a first mortgagee to keep his incumbrance alive, and for his benefit to do so, the purchase by him of the equity of redemption does not extinguish his incumbrance, and therefore that a mortgagee so purchasing may contest the validity of a second mortgage, so far as it affects him on the ground that it was an infringement of a stipulation against alienation in the contract between him and the mortgagor (p), or may resist a claim by the second mortgagee to bring to sale the mortgaged property purchased by him (q).

There are also recent decisions by the Calcutta High Court to the effect that a prior mortgagee who purchases the mortgaged property, and sets off the money due to him under his mortgage against the consideration money, does not thereby lose the benefit of his mortgage, which retains its priority over any second or subsequent mortgage (r).

The latest reported case in which these principles have been applied is one which came before the Privy Council on appeal from the High Court at Calcutta (s). A lender of money upon a mortgage, which, however, having been made by a person not having authority to charge the greater part

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(o) *Shantapa v. Balapa*, I. L. R. 6 Bom. 561.

(p) *Lachmin Narain v. Koteswar Nath*, I. L. R. 2 All. 826.

(q) *Gaya Prasad v. Salik Prasad*, I. L. R. 3 All. 682. (F.B.), followed in *Har Prasad v. Bhagwan Das*, I. L. R. 4 All. 196, and *Ali Hasan v. Dhirja*, I. L. R. 4 All. 518 (cf. p. 525.)

(r) *Bissen Doss Singh v. Sheo Prasad Singh*, 5 C. L. R. 29; *Gopal Sahoo v. Gunga Pershad Sahoo*, I. L. R. 8 Calc. 530.

(s) *Mohesh Lal v. Mohant Bawan Das*, I. L. R. 9 Calc. 961 (P.C.).

of the property included in it, was to that extent invalid, relied upon a charge effected in a prior paid off mortgage to another mortgagee of the same property. The balance due for the prior mortgage debt had been paid out of the money advanced on the later, and the prior instrument had come into the possession of the present mortgagee. The Privy Council held that the prior mortgage had been extinguished. It must be presumed, in the absence of any expression of intention to the contrary, that the borrower who claimed to be the owner of the property which he attempted to charge, intended that the money should be applied in paying off and extinguishing the prior mortgage, there being no intermediate incumbrance. It must also be presumed that the lender lent the money upon the security of the later mortgage, and therefore he did not become entitled to an additional security, merely because that which he had taken had proved invalid in part.

So, in an earlier case decided by the Bombay High Court, where the mortgage by the second mortgagee recited that the mortgagors had paid portion of the money borrowed by them from the second mortgagee in paying off the first mortgage, and that the first mortgagee had returned his mortgage to the mortgagors, who had then made it over to the second mortgagee, but there was nothing to show any assignment of his mortgage by the first mortgagee or any intention on his part to assign it or keep it on foot for the benefit of the second mortgagee, the Court refused, in a suit for possession by a purchaser of the property at a sale in execution of a decree obtained prior to the date of the second mortgage, to recognize the second mortgagee as occupying the same position as the first mortgagee, so as to require the execution purchaser, before he could recover the property, to pay as redemption to the second mortgagee the

amount which was said to have been paid to the first mortgagee (t).

Where the purchaser of the equity of redemption, also purchased in the name of a trustee the interest of the mortgagee, the High Court of Calcutta, following the English cases, held that there was no merger of the mortgagor's and mortgagee's interest, and consequently no extinguishment of the mortgage debt (u).

A second mortgage was entered into by one of two prior mortgagees in conjunction with a third party, the terms being that a portion of the money advanced should be paid to the prior mortgagees, and the remainder be paid to the mortgagor. In a suit by a subsequent mortgagee, whose mortgage had been created prior to the date of the second mortgage, for the execution of a conveyance of the estate to him in accordance with the terms of his agreement, it was held that the prior mortgage was defunct and at an end, an entirely fresh transaction, with a new mortgagee having been entered into, and therefore that a purchaser at a sale in execution of a decree on the second mortgage could not fall back upon the lien created by the prior mortgage as a defence to the plaintiff's claim. The Court further expressed its doubts whether, even assuming that the auction purchaser had no notice of the agreement on which the plaintiff's claim was based, he could claim that specific performance of that agreement should not be granted on the ground that he was a *bonâ fide* purchaser for value without notice within the meaning of clause (B) of sec. 27 of the Specific Relief Act, inasmuch as the contest lay between a prior and subsequent lien created upon the same property, which had passed to the transferee under

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(t) *Apaji Bhirav Rayrikur v. Karji*, I. L. R. 6 Bom. 64. Compare *Krishna v. Narayana*, I. L. R. 7 Mad. 127; and see the Transfer of Property Act, 1882, s. 74.

(u) *Kalipresonno Ghose v. Kamini Soonduri Chowdhrairi*, I. L. R. 4 Calc., 475.

a sale in execution of a decree for the enforcement of the subsequent lien (v).

There is no rule as to "tacking," such as is known to the English law (w). Thus where a second mortgagee paid off the first mortgagee, but did not take an assignment of the first mortgage nor do any thing to keep it alive as a security against subsequent incumbrances created prior to the date of the second mortgage, it was held that these incumbrances had priority over the second mortgage (x).

In a recent Bombay case the facts were as follows:—The owner of a house mortgaged it in 1861 to the defendant for Rs. 190 and put him into possession. The mortgage deed needed no registration, and was not registered. The mortgagor next mortgaged the house in 1873 to the plaintiff for Rs. 300 by a duly registered deed. The mortgagor again in 1874 borrowed a further sum of Rs. 500 from the defendant, and executed in his favour another deed of mortgage of the house which was duly registered. The plaintiff in 1876 sued the mortgagor for possession and obtained a decree, the execution of which the defendant

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(v) *Badri Prasad v. Daulat Ram*, I. L. R. 3 All. 706.

(w) Compare sec. 80 of the Transfer of Property Act, 1882. As to *tacking* see 2 Fisher's Law of Mortgage, 3rd. Ed. pp. 599, 600. "A prior legal mortgagee by annexing to his original security another which he holds for a subsequent debt, or an incumbrancer subsequent to the second, by getting in a prior legal security may, under certain circumstances, postpone the rights of *mesne* incumbrancers until satisfaction of both the securities which have been thus united. This doctrine called *tacking* is applicable both to real and personal estate. It seems to be altogether contrary to any principle of equity, the essence of which is equality; and it is in fact only founded upon the preference which in this country [England] is shewn to legal titles."

(x) *Gaur Narayan Mazumdar v. Braja Nath Kundu Chowdhry*, 5 B. L. R. 463; see also *Udaya Chandra Rana v. Bhajahari Jana*, 2 B. L. R. (App.) 45; S. C. 11 W. R. 310; *Goluk Nath Misser v. Lalla Prem Lal*, I. L. R. 3 Calc. 307 (cf. p. 309).

resisted. The plaintiff then sued the defendant to eject him and to obtain possession of the property until payment of the amount due on his mortgage. The defendant denied the plaintiff's mortgage, and set up his own two mortgages, and claimed to be paid the amount due on both of them before he could be called upon to deliver up possession. It was held by the High Court that the English doctrine of tacking was of so special and technical a character, and so little founded on general principles of justice, that it ought not to be held applicable to the *Mofussil* of Bombay, but that the obligations arising out of the successive mortgages should be discharged in the order of their date, and consequently that the defendant's right as against the plaintiff was either to redeem the plaintiff's intermediate mortgage, or else to hold the mortgaged property until his own first mortgage was redeemed by the plaintiff, but that he could not claim to retain possession, as against the plaintiff, until his second mortgage, as well as his first, was paid off, since the plaintiff's mortgage was prior in date to, and, therefore, was to be preferred before the defendant's second mortgage (y).

There are, however, certain cases in which the Indian Courts have permitted subsequent debts to be tacked on to the mortgage debt. Thus in a case decided in 1853 the Court of *Sudder Dewanny* in the N. W. P. declared: "It will be found, on reference to the printed decisions of the Court, of which a few are cited in the margin, that the practice, of taking bonds of subsequent date to the original mortgage which is thereby rendered liable for the discharge of the aggregate amount is far from uncommon, and that it has been fully recognized by the Court" (z); and in a later case (a), decided in 1860, the same Court remarked: "The terms

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(y) *Narayan Venkoba v Pandurang Kamat*, I. L. R., 7 Bom. 526.

(z) *Khyrtee Ram v. Mussumat Chenoo*, S.D.A. N.W.P., 1853, p. 726.

(a) *Hunuman Pershaud v. Sheo Narayun Sookul*, S.D.A. N.W.P., 1860, p. 122.

of the bond, which is not disputed, are distinct. The borrower engaged to pay off that sum *before* liquidating the mortgage loan, or in other words tacked it to the mortgage, which the lower Courts have considered to be discharged by the mere payment of the mortgage loan. The property therefore still remains saddled with this liability, and the mortgage has not been redeemed."

And the principle of these cases has been followed by the High Court of the same Provinces, in a recent decision. The mortgagor of an estate gave the mortgagee four successive bonds for the payment of money, in each of which it was stipulated that, if the amount were not paid on the due date, it should take priority of the amount due under the mortgage, and redemption of the mortgage should not be claimed until it had been satisfied. The representative in title of the mortgagor subsequently sued the mortgagee for possession of such estate on payment merely of the mortgage money. The Court held that, although such bonds did not in so many words create charges on such estate, yet inasmuch as it appeared from their terms that it was the intention of the parties that the equity of redemption of such estate should be postponed until the amount of such bonds had been paid, the representative in title of the mortgagor was not entitled to possession of such estate on payment merely of the mortgage money (b).

In a recent case the High Court of Bombay, in order to avoid circuity of actions, allowed a mortgagee to tack on a simple contract debt to his mortgage debt (c). In this case the facts were that one K, who was a relation of the plaintiff, executed a deed of conveyance by which he conveyed all his estate to the plaintiff, in consideration of his undertaking to pay all his debts. The

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(b) *Allu Khan v. Roshan Khan*, I. L. R. 4 All. 85.

(c) *Bagho Gobind Parajpe v. Balvant Amrit Gole*, I. L. R. 7 Bom. 101.

deed stated that it was *K*'s desire that the estate should remain in his family. After *K*'s death, the plaintiff sued for an account and for redemption of some of *K*'s land which had been originally mortgaged by him to the defendant. It was found that the defendant was the only unpaid creditor, and that the property was more than sufficient to pay the defendant. The Court held that due effect could not be given to the whole of the instrument under which the property was conveyed to the plaintiff, unless it was construed as a conveyance to the plaintiff charged as between him and *K* with the payment of the latter's debts, and therefore that, as, on *K*'s death, his creditors would be entitled in an administration suit to have the charge of *K*'s debts enforced in their favour, the Court, in order to avoid circuity of suits which would otherwise be necessary, ought, under the circumstances, to allow the defendant to tack on to his mortgage debt, a simple contract debt owing to him by *K*, on the same principles as by English law a mortgagee is entitled to tack on a simple contract debt as against executors or volunteers under the mortgageor.

There is one case in which the Bombay High Court recognized the equitable doctrine laid down by the English Courts as to the right of the mortgagee to consolidate several securities (*d*). In the case in question the

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(*d*) This doctrine is thus described in 2 Fisher's Law of Mortgage, 3rd Ed., p. 630 :—

"If the owner of different estates mortgage them to one person, separately, for distinct debts, or successively, to secure the same debt, or the same debt with further advances, the mortgagee may insist that one security shall not be redeemed alone; upon the principle that redemption being an equitable right, the person who redeems must on his part do equity towards the mortgagee and redeem him entirely, not taking one of his securities, and leaving him exposed to the risk of deficiency as to the other."

Sec. 61 of the Transfer of Property Act, 1882, abolishes this doctrine.



Court held that the doctrine applied to a Mahomedan mortgage (e).

There are several cases which are remarkable as showing that a mortgage may be in abeyance for a time, without its validity being affected. Thus, where the mortgage is of an usufructuary nature, and the Collector comes in and farms the land, not on account of any fault or mismanagement on the part of the mortgagee, the mortgage is, as respects the land, in abeyance during the Collector's possession, but will revive in full force when he gives it up again (f). So if a mortgagee purchases the remaining rights of the mortgagor, and his purchase is set aside on the ground of the mortgagor having previously disposed of those rights, the mortgagee's original title will revive in full force (g).

Where a mortgagor, by misrepresentation, fraudulently induced the mortgagee to substitute for the security of the property to which his mortgage bond related, the security of another property to which the mortgagor had no title, the Court held, in a suit by the mortgagee to enforce his lien upon the property originally included in his mortgage bond, that the fraud by the mortgagor vitiated the subsequent transactions and restored to its operation in its precise terms the original mortgage bond even as against a *bona fide* purchaser of the original mortgaged property who bought without notice of the mortgage (h).

(e) *Vithal Mahadev v. Daud Muhammad Hussien*, 6 Bom. H. C. (a. c. j.) 90.

(f) *Syud Kuramut Ali v. Syud Imdad Ali*, S.D.A. N.W.P., 1852, p. 7; *Jehan Khan v. Khoojah Ali Khan*, S.D.A. N.W.P., 1853, p. 59; *Bhugwan Doss v. Mussumat Maryum Bebee*, S.D.A. N.W.P., 1855, p. 553.

(g) *Chowdhree Jugernath v. Ramnarain Doss*, S.D.A. N.W.P., 1854, p. 183.

(h) *Safdar Ali Khan v. Lachman Das*, I. L. R. 2 All. 554.

A mortgagor sold the mortgaged property to the mortgagee, who was in possession thereof under his mortgage. The sons of the mortgagor obtained a decree setting aside the sale as invalid under Hindu law, but the mortgagee, purchaser, remained in possession of the property. The mortgagor then sued the mortgagee for possession on the ground that the sale had been set aside as invalid, but the Court held that he could not be permitted to retain the purchase money and to eject the mortgagee, purchaser, and must be held estopped from pleading that the sale was invalid. A judgment-creditor of the mortgagor and his sons having caused the property to be attached and advertised for sale in execution of his decree, the mortgagee objected on the ground that the mortgagor and his sons had no saleable interest therein. This objection was disallowed, and the rights and interests of the mortgagor and his sons were sold in execution of the decree and purchased by the judgment-creditor. In a suit by the judgment-creditor, as the purchaser of the equity of redemption, for redemption of the mortgage, it was held that the sale having been declared inoperative, and having been completely set aside, it could not be said that the mortgage had been extinguished by the execution of the sale-deed and, therefore, the mortgage transaction never having been impugned, the plaintiff as the representative of the original mortgagor was entitled to redeem the mortgage. The mortgagee not having contested in a suit the order dismissing his objection to the sale of the property in execution of the plaintiff's decree could not now deny that the plaintiff had purchased the rights and interests in the property remaining to the mortgagor and his sons. Moreover, the mortgagee had no lien on the property in the hands of the plaintiff in respect of his purchase money, though he might have sued the mortgagor for the recovery of the money, and might possibly in

execution of his decree proceeded against the mortgagor's rights and interests in the property (i).

The mortgagee of certain shares of certain villages applied for foreclosure under Ben. Regulation XVII of 1806. While the year of grace was running and shortly before its expiration a compromise was come to. It was agreed by the mortgagor to transfer by sale to the mortgagee the shares of three of the villages in lieu of the mortgage money, and that he should not assert his right under sec. 7 of Act XVIII of 1873, as ex-proprietor, to retain the *sir* lands appertaining to such shares. The mortgagee agreed to relinquish his claim on the remaining shares arising out of the mortgage and the foreclosure proceedings. It was further agreed that if the mortgagor asserted the right mentioned above, the mortgagee should be entitled to assert his right in respect of all the shares as a mortgagee who had foreclosed. The mortgagor subsequently, in breach of his condition, asserted his right under sec. 7 of Act XVIII of 1873 to the *sir* land appertaining to the shares transferred to the mortgagee. Thereupon the mortgagee sued the mortgagor for possession of all the shares, by virtue of the foreclosure proceedings. It was contended by the mortgagor that the compromise put an end to the foreclosure proceedings, and the breach of his agreement by the mortgagor could not revive these proceedings, but the Court held that the mortgagee on the failure of the mortgagor to give effect to the compromise transaction, was clearly entitled to fall back on his equities under his mortgage, and the foreclosure proceedings taken thereunder (j).

As the holder of a *zur-i-peshgee* lease has rights equivalent to those of a mortgagee, he has such an interest in the lands leased, that if execution be issued against that "interest," it must be sold according to the rules prescribed

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(i) *Basant Rai v. Kanauji Lal*, I. L. R. 2 All. 455.

(j) *Dhondha Rai v. Meghu Rai*, I. L. R. 4 All. 332.

for the sale of realty, not according to those laid down for the sale of personalty (k).

According to English law, if the owner of two estates mortgage them both to one person, and then mortgage one of them to another person, without notice, the second mortgagee may insist, under the doctrine of marshalling, that the debt of the first shall be satisfied out of the estate not mortgaged to the second, so far as that will extend. As this rule is in principle equitable and just, it would seem to be one which might be applied in this country also, at any rate in cases where it would not prejudice the first mortgagee's right to recover principal, interest, and costs (l).

It has recently been held by the Calcutta High Court that a mortgagee who had obtained a decree on his mortgage, under which he had attached the mortgaged property and obtained an order for sale, is entitled to enter a caveat against the grant of probate of a will, on the ground that the will was a forgery, got up by the mortgagor for the purpose of saving the mortgaged property from being sold in execution of the decree on the mortgage (m).

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(k) *Brejollol Oopadya v. Maharanee Indurjeet Kowar*, S.D.A., 1861, vol. 1, p. 97.

(l) See Fisher's Law of Mortgage, 3rd Ed., p. 704, &c; also *Bishonath Mookerjee v. Kisto Mohun Mookerjee*, 7 W.R. 483; and compare sec. 81 of the Transfer of Property Act, 1882; but see *Kristodass Kundoo v. Ramkant Roy Chowdhry*, I.L.R. 6 Calc. 142, and *Rama Raju v. Subbarayudu*, I.L.R. 5 Mad. 387; and see *infra* Chap. IX.

(m) *Surbomongala Dassi v. Shashibhooshun Biswas*, I. L. R. 10 Calc. 413.

## CHAPTER VIII.

### OF REDEMPTION.

THE mortgagor, his heirs, and assignees to whom he has transferred his interest, are entitled to redeem a mortgage (a). But the right to do so, exists only up to the time of the lands being sold under a decree of Court in satisfaction of the mortgagee's claim, or, where the mortgage is by way of conditional sale, until the mortgage has been finally foreclosed (b). And redemption can never take place, until a sum equal to the amount of the principal monies advanced, with interest at the rate stipulated for,—or if no rate has been stipulated for, at twelve per cent.,—has been received by, or tendered to the mortgagee. If the contract was entered into before Act XXVIII of 1855 came into force, it is not in any case necessary to pay or tender interest at a higher rate than twelve per cent. per annum.

The payment to the mortgagee of what is due to him, must come either from the usufruct of the property pledged, or from some of those persons in whom the right of redemption is vested : for the interest of the mortgagee in the land is inferior only to that of the mortgagor and his representatives, and if they do not redeem, the mortgagee need not allow any one else to do so. A mortgagee, therefore, is not bound to receive payment of the sum due to him, or to

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(a) As to the right of a mortgagor to redeem and the persons who may sue for redemption under the Transfer of Property Act, 1882, see secs. 60 and 91 of that Act.

(b) The Madras mortgages by conditional sale, which are construed as irredeemable (see *supra* p. 20), are, of course, exceptions to this rule. It is to be noted, however, that it is not every mortgage which purports to be one by conditional sale that is irredeemable, see *Thumbursawmy Moodelly v. Hossain Rowthen*, I. L. R. 1 Mad, 1 (P. C.) ; *Amirudin v. Sobhanadri*, I. L. R. 6 Mad, 339,

relinquish his lien, without having proof that the party offering to redeem is entitled to insist upon his right to do so. And he may put any one who claims the right, to proof of his title, not being obliged to give up his mortgage tenure to a stranger. Thus, a person claiming to redeem on the ground of inheritance from the mortgagor, must prove that he really is the heir of the mortgagor, before he can succeed in his suit (c). "The mortgagee is not bound to any person who may start up with the allegation that he has succeeded to the rights of the original mortgagor. On the contrary, it is his duty, as trustee for the mortgagor, to take the same care of the estate as he would of his own, and to admit no claims upon it until assured of the title of the claimant" (d).

It would seem, however, that if a party, whose title is to some extent imperfect, seeks to redeem, and is able to prove a perfect title at the hearing of the cause, he should have a decree for redemption. Thus, where a purchaser of the equity of redemption at an execution sale brought a suit for redemption before the certificate of sale was issued, but this was obtained by him after the suit had commenced, it was held that the plaintiff was entitled to a decree for redemption, even though his title may to some extent have been imperfect when he brought the suit (e).

If the mortgagee rejects the tender of one not entitled to redeem, the mortgagor cannot afterwards claim any benefit from such tender, unless it was expressly made on his account. Thus a creditor having obtained a decree against his debtor, wished to put it in force by attaching and selling certain lands belonging to the latter. But the lands being

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(c) *Bhujjun v. Mussumat Moollo*, S.D.A. N.W.P., 1852, p. 45 ;  
*Sheo Lall v. Hurpersaud*, S.D.A. N.W.P., 1860, p. 120.

(d) *Baboo Kunkya Lal v. Syud Dad Alee*, S. D. A., 1859, p. 1273,  
(cf. p. 1276.)

(e) *Krishnaji Ravji Godbole v. Ganesb Bapuji Patvardhan*,  
I. L. R. 6 Bom. 139.



in the possession of a mortgagee by conditional sale, the decree-holder instead of attaching them deposited in Court what was due on the mortgage, and brought a suit for redemption, in which he was unsuccessful as it was held that he had no title to redeem. The mortgagor himself afterwards brought a suit for redemption, on the ground that the right to redeem (which would otherwise have been barred), had been kept alive by the money having been tendered by the decree-holder. The Court was of opinion that the money so deposited could not be considered to be the money of the mortgagor, it not having been deposited on his account, or for his benefit in any way. It was not deposited with a view to save his estate from the conditional sale, but with the view of bringing it to an absolute sale by public auction, in satisfaction of the claims of the depositing party (f).

In this case, however, the deposit, if it had been made in the mortgagor's name and with his consent, would have been good, both as entitling the creditor to redeem, and as keeping alive the right of the mortgagor himself to do so. It would then have been the act of the mortgagor himself.

It has been held in a case to which the provisions of the Code of Civil Procedure of 1877 (which are the same as those of the Code now in force) were applicable that an attaching-creditor has not, as such, any right to redeem a mortgage subsisting prior to his attachment. There is no analogy between the position of an attaching-creditor here and that of an execution-creditor in England. Moreover, an examination of the clauses of the Code bearing on the subject make it tolerably clear that the Legislature did not intend to give an attaching-creditor the right to redeem a mortgage (g).

A person holding under the mortgagor,—as a mere

(f) *Gopaul Lal v. Muharaja Pitumber Singh*, 3 Sel. Rep. 54.

(g) *Soothul Chunder Paul v. Nitye Churn Bysack*, I. L. R. 6 Cal. 663.



*mokurreridar*—whose tenure has been created pending the mortgage, has no right of redemption (*h*).

A doubt, however, seems to have been thrown on the decision in that case, for in a late case (*i*) the High Court at Calcutta held that a *patnidar* was entitled to be made a defendant in a mortgage suit so as to have an opportunity of redeeming the mortgage. In that case it appeared that the *patni* was created subsequent to the mortgage debt, but prior to the date of the institution of the mortgage suit, and the Court in holding that he was entitled to redeem, based its decision upon the ground that in this country *patnis*, *zur-i-peshgee* leases and interests of that nature are very considerable interests in the land, and cannot be looked upon as a mere lease for a term of years which a mortgagee might have the right to disregard. They are in fact substantial proprietary interests on the grant of which considerable premiums are paid, and it is only equitable that persons in that position should be allowed the opportunity of preserving their interests by redeeming any mortgages made by the superior holder.

Persons to whom the mortgagor has transferred his whole interest, that is to say, purchasers *out and out* of his equity of redemption, are entitled to redeem (*j*). So in a recently reported case the High Court of Bombay allowed the purchaser under a decree obtained by the prior mortgagee with notice of the claim of a second mortgagee, who had not been

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(*h*) *Lalla Doorga Pershad v. Lalla Luchmun Sahoy*, 17 W.R. 272. It would be otherwise by English Law. See 2 Fisher's Law of Mortgage (3rd Ed.), p. 767.

(*i*) *Kasumunnissa Bibee v. Nilratna Bose*, I.L.R. 8 Calc. 79.

(*j*) *Kishen Bullubh Muhta v. Belasoo Commur*, 3 W. R. 230; *Bissonath Singh v. Brajonath Doss*, 6 W. R. 230; *Gunga Gobind Mundul v. Banee Madhub Ghose*, 11 W. R. 548; *Sheo Golam Singh v. Ram Roop Singh*, 23 W. R. 25; *Heera Singh v. Rugho Nath Suhai*, 4 N. W. P. (Agra) H. C. 30; *Sutherland v. Campbell*, S. D. A., 1853, p. 859; *Chowbey Hurbuns Rae v. Chowdree Petum Singh*, S.D.A. N.W.P., 1854, p. 371; *Ameer-oollah Khan v. Lalmun*, S.D.A. N.W.P., 1854, p. 421.

made a party to the suit of the first mortgagee, and was therefore not bound by the decree in it, to redeem the land purchased by him from the second mortgagee (*k*). It was, however, apparently not so held formerly (*l*).

If a purchaser of the mortgagor's equity of redemption makes default in paying the purchase money or any portion of it, this does not necessarily invalidate the sale. In a suit brought by the purchaser to redeem, the mortgagee cannot avail himself of the objection that the full amount of the purchase money has not been paid, since his only right is to be satisfied that the person seeking to redeem is not a stranger, but one to whom the equity of redemption has been transferred by a *bond fide* sale (*m*).

A mortgagee by conditional sale can redeem one who has a prior simple mortgage of the same property (*n*). And where there was a simple mortgage and a subsequent mortgage by conditional sale, the first mortgagee having got a decree and having sold the property in execution, the Court held that the second mortgagee could have redeemed the first, and that not having done so, but having allowed the estate to be sold to satisfy the first mortgage, he had no claim as against the purchasers at the sale, and could not follow the lands in their hands (*o*).

The Agra Sudder Court formerly held that no subsequent mortgagee had the right to redeem a prior mortgagee by

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(*k*) *Radhabai v. Shamrav Vinayak*, I. L. R., 8 Bom. 163, and see *infra* Chapter IX, where the law as to making purchasers parties to a mortgage suit is considered.

(*l*) *Jyesunkur Chund v. Zummeerooddeen*, S.D.A., 1847, p. 499; *Sheikh Amudee v. Chahut-oonnissa*, S.D.A. N.W.P., 1851, p. 210.

(*m*) *Heera Singh v. Ragho Nath Suhai*, 4 N.W.P. (Agra) H.C. 30.

(*n*) *Ubhychurn Sheikhdar v. Joogul Kishore Raee*, S.D.A., 1848, p. 305; *Baboo Bunwaree Lall v. Baboo Hunnoomanpersad Dobey*, S.D.A., 1859, p. 1567; *Luchmun Suhae Chowdhry v. Gujraj Jha*, 4 W.R. 45.

(*o*) *Baboo Bunwaree Lall v. Baboo Hunnoomanpersad Dobey*, S.D.A., 1859, p. 1567; *Luchmun Suhae Chowdhry v. Gujraj Jha*, 4 W.R. 45. See also *Bhugwan Doss v. Behary Khan*, Marsh. 191.

conditional sale. The Court said that "the parties to a mortgage contract are mutually bound by their engagements to each other; and as the first mortgagee's contract was with his mortgagor, and with him only, or with his legal representative, in which light the second mortgagee cannot be viewed, it is not competent to any third party to claim, or to the Courts to compel a surrender of the tenure in whole or part, for which the first mortgagee is only answerable to the person from whom he received it, by payment of the amount of the mortgage loan. It equally follows, that the mortgagor is not at liberty to devolve the right of redemption to a third person, not a legal representative" (p). And the Calcutta Sudder Court appears to have come to the same conclusion (q).

But these decisions have been practically over-ruled (r). In a case in which there was a zur-i-peshgee lease for nine years, with a condition against alienation, and after the nine years had expired a second zur-i-peshgee lease was granted by the mortgagor to a third party,—it was held by the Agra High Court that the latter could sue to redeem the first lessee (s). "The nature of the original transaction was not such as to entitle the lender to say that the borrower was (and this even after the expiration of the lease) prohibited from dealing in good faith with a third person for the means of discharging the prior incumbrance: and if the new lease was made on the security of the land, (whether the security contracted for was like the former

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(p) *Lal Baz Khan v. Mohamed Nenan*, S.D.A. N.W.P., 1853, p. 304.

(q) *Sutherland v. Campbell*, S.D.A., 1853, p. 859; *Doorgachurn Biswas v. Burda Soondree Debea*, S.D.A., 1856, p. 948.

(r) *Kishen Bullubh Muhta v. Belasco Commur*, 3 W.R. 230; *Sheo Golam Singh v. Ram Roop Singh*, 23 W.R. 25; see also *Bissonath Singh v. Brojonath Doss*, 6 W.R. 230; *Dookhchore Rai v. Hajee Hidayut-ool-lah*, N.W.P. (Agra) H.C. (F.B.) 7; and see *ante* p. 290.

(s) *Dookhchore Rai v. Hajee Hidayut-ool-lah*, N.W.P. (Agra) H.C. (F.B.) 7 (*cf.* p. 11).

or a term of years, or of a higher nature) the transaction conferred such an interest in the land on the lender, as to entitle him to occupy the mortgagor's place for the purpose of maintaining a suit to redeem. To hold otherwise would lead in many cases to the infliction of grievous hardship on the mortgagor; for he may have been compelled to mortgage his estate at a time when the rate of interest was high, and subsequently be enabled to obtain a loan on easier terms; while the first mortgagee receiving his principal and interest in full, and having, as in the present case, been in possession during the whole term originally bargained for, would have received all that he could under any shadow of pretext lay claim to. The decisions, in those cases where the mortgage was by conditional sale, as to the persons who are properly to be deemed the 'legal representatives' of the mortgagor within the meaning of the Regulation, do not apply to a case like the present, even assuming that those decisions are not to be questioned. The lender has never dealt for any interest in the estate (beyond that which has already expired) save merely for the purpose of securing the repayment of the loan; if he is allowed to retain possession until he is fully repaid, he will have received all that he contracted for; and if he obtains this, we think he cannot justly be allowed to object that the person who seeks to redeem the property is not the borrower himself, but one who has acquired from the borrower an interest in the property sufficient, as we hold it to be, to authorize redemption. The reasoning in the cases quoted, and especially in the earliest case (15th May 1853), is not satisfactory to us. The mortgage contract is there regarded as a contract strictly personal, between the mortgagor and the mortgagee, or at any rate personal to this extent, that the latter may object to the intervention of any third person unless such person fully represent the mortgagor by reason of his having acquired the whole remaining proprie-

tary right and interest of the mortgagor in the land. Viewed as a security for obtaining the payment of a loan, the mortgage contract appears to confer no such right on the mortgagee, nor does it incapacitate the mortgagor from any other dealing (except in defeasance of the rights of the mortgagee) with the property."

And so in a late Bombay case, where the facts were that a prior mortgagee by conditional sale had obtained a foreclosure decree in a suit to which the puisne mortgagee, who had possession was not made a party, the Court held that the puisne mortgagee was entitled to redeem the land from the prior mortgagee (*t*).

To hold that a subsequent mortgagee has not the right of redeeming a prior mortgage by conditional sale, is in direct opposition to the principle which is the basis of the rule that a purchaser of the mortgagor's whole interest, has the same right of redemption that his vendor had. The estates of a mortgagee and of an absolute purchaser are alike, only that of the former is subject to be divested on the happening of certain events. A mortgagee is, in fact, the purchaser of the rights of the mortgagor: he buys them, but gives the mortgagor the chance of repurchasing within a certain period. In England and in America, it has always been held that every person being a subsequent incumbrancer, or having a legal or equitable lien on premises already subject to a mortgage, may insist on a right to redeem on payment of the principal, interest and costs due to the party redeemed, he who redeems being himself liable to be redeemed by those below him (*u*).

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(*t*) *Sankana Kalana v. Virupakshapa Ganesappa*, I. L. R. 7 Bom. 146, and see *infra* Chap. IX, where the law as to making *puisne* mortgagees parties to a mortgage suit is considered.

(*u*) 2 Fisher's Law of Mortgage, (3rd Ed.), p. 745; Story's Equity Pleading; ss. 185, 186, pp. 231, 232; and compare the Transfer of Property Act, 1882, ss. 74 and 75.

The refusal to recognise the right of a subsequent incumbrancer to redeem a prior mortgagee by conditional sale, probably arose from the principle being lost sight of that the mortgage is merely a security for the debt and collateral to it, and that if the debt is paid by one who has an equity over the land, the mortgagee has got all that he had a right to, or that it was ever intended he should have (v). The transaction was treated by the Courts as one of absolute purchase to take effect on a certain day, but liable to become void in the event of payment by the mortgagor before that day. It was in fact dealt with as it was in olden times by the English Courts, before the present system of equity sprung up. The terms of the contract were followed literally; and as they contained no agreement for the re-payment to the mortgagee of the money advanced by him, it was considered that he looked to be repaid by getting possession of the property pledged, and by that alone, and that he was entitled to the possession, except in the one event of the mortgagor paying him off strictly in the mode agreed upon.

A third party to whom the right has been expressly reserved in the mortgage deed, is entitled to redeem, as the mortgagor himself might have done (w).

But a person may by his own acts deprive himself of the right to redeem. A mortgagor presented a petition in Court, stating that he was unable to pay off his debt, and that he had put the mortgagee in possession as on foreclosure. The Court seems to have been of opinion that he was estopped by this proceeding, from afterwards redeeming; but that unless delivery of possession to the mortgagee were proved, there was nothing in what passed to

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(v) See *Hunooman Persaud Panday v. Mussumat Babooee Munraj Koonweree*, 6 Moore's I. A. 393.

(w) *Ramsurrun Singh v. Mussumat Soobutchna*, S.D.A. N.W.P., 1848, p. 187.



bar the right of one claiming under an absolute purchase from the mortgagor (x).

The general principles by which the question of the date at which a mortgage may be redeemed (y) must be decided, have been enunciated by the Madras High Court in a case relating to the redemption of a mortgage granted for a term of years (z). In delivering the judgment of the Court the learned Chief Justice (*Sir Charles Turner*) made the following observations:—

“There can exist no doubt that the parties to a contract of mortgage are entitled to enter into any agreement which is not forbidden by law. They may agree that the payment of the debt and the right to redeem shall be deferred to a future date; they may also agree, as in this case they have apparently agreed, that the mortgagee shall look for the payment of the principal money and interest only to a rent with which he himself is to be charged for the use and occupation of the mortgaged property. This being so it is the duty of the Court, as was observed in *Dorappa v. Kundukuri Mallikarjunudu* (a), ‘to act on the sensible rule applicable to the case of other contracts that the intention of the parties is to be ascertained

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(x) *Sheikh Hussoo v. Uttur Bibi*, S.D.A., 1849, p. 311; and compare the Transfer of Property Act, 1882, s. 60.

(y) The cases of usufructuary mortgages entered into before the passing of Act XXVIII of 1855, and of mortgages by conditional sale to which Bengal Regulation I of 1798 applies, are exceptional and are noted *infra* when treating of the redemption of these mortgages respectively.

(z) *Sri Raja Setrucherla Ramabhadra Raju Bahadur v. Sri Raja Vairicherla Surianarayanaraju Bahadur*, I.L.R. 2 Mad. 314. See also *Dorappa v. Kundukuri Mallikarjunudu*, 3 Mad. H. C. 363, and the judgment of Innes, J., in *Keshava v. Keshava*, I.L.R. 2 Mad. 45; and compare *Mashook Ameen Suzzada v. Mareem Reddy*, 8 Mad. H. C. 31. The English law will be found in 2 Fisher's Law of Mortgage, (3rd Ed.), p. 729.

(a) 3 Mad. H.C. 363 (*cf* p. 366.)



from the terms of their agreement and given effect to.' \*

\* \* Where a day is fixed for the payment of a debt and nothing more appears, the presumption is that the date is fixed for the convenience of the debtor and that he may repay the debt at an earlier period, and in like manner, where the mortgage is created as a mere security for the sole purpose of ensuring the payment of the debt at a certain date, we are not prepared to say that the debtor may not discharge the debt and put an end to the security at an earlier date, but where the continuance of the enjoyment of the mortgaged property for a prescribed period forms a material part of the contract, it would be inequitable to deprive the mortgagee of this right on the mere ground that the contract was one of mortgage. Where parties agree that possession of the property shall be transferred to a mortgagee for a certain term, it may be inferred that they intended that redemption should be postponed until the end of the term, but the creation of a term is by no means conclusive on this point. It may be apparent from the express terms of other conditions of the contract, or by implication that the parties intended that redemption should be allowed at an earlier period, as, for instance, when the debt had been discharged in a manner contemplated by the parties, and the purpose for which the term had been created thus satisfied, and this is apparently the ground on which the decision in *Dorappa v. Kundukuri Mallikarjunudu* (b) proceeded. In each case then the Court must look to the language of the contract to ascertain whether the parties intended that redemption should take place only at the end of the term, or at an earlier period, at the option of the mortgagor."

In accordance with these principles, where there was no agreement for payment of interest at an annual rate,

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(b) 3 Mad. H.C. 363 (cf. p. 367).

but a lump sum equal to the principal was to be accepted as interest for the term and a small balance of rent was to be paid at the end of the term when the land was returned, and, taking the net annual usufruct at a fixed sum, a term of years was created during which the debt and interest were to be liquidated by that usufruct, the risk of seasons and payment of Government rent falling on the mortgagee, the Court held that the basis of the contract was the enjoyment of the property by the mortgagee for the term fixed and therefore that the mortgagor was not entitled to redeem before the expiry of that term (c).

Where a mortgage deed stipulated for the liquidation of a moiety of the debt by the usufruct of certain land for seven years, and as to the other moiety stipulated for its repayment by instalments in five years, and, in default, for its liquidation by the possession and the usufruct of the same land being continued and enjoyed after the expiry of the seven years' term, and no further term was created, it was held by the same Court that the mortgagor was entitled to redeem at any time after the expiry of the seven years' term (d).

Where a deed was described as a *Kanam* deed and contained stipulations as to compensation for improvements, a clause to the effect that the land was to be surrendered "whenever the amount advanced is ready," was held by the same Court not to entitle the mortgagor to redeem before the customary twelve years' term had expired, but must be construed as referring to a period subsequent to the term of twelve years (e).

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(c) *Sri Raja Setrucherla Ramabhadra Raju Bahadur v. Sri Raja Vairicherla Surianarayanaraju Bahadur*, I.L.R. 2 Mad. 314.

(d) *Marana Ammanma v. Pendyala Perubotulu*, I. L. R. 3 Mad. 230.

(e) *Kanara v. Govindan*, I.L.R. 5 Mad. 310 ; and see *supra*, pp. 22 and 23.

It has been ruled by the Bombay High Court that the general principle as to redemption and foreclosure is that, in the absence of any stipulation, express or implied, to the contrary, the right to redeem and the right to foreclose are co-extensive. So where it was admitted that under the mortgage, the mortgagee could not foreclose until the expiration of ten years from its date, the Court held that the mortgagor, who had stipulated to pay the debt with interest *within* ten years and redeem the mortgaged property, could not redeem in a less period than ten years, the mere use of the word "within" not being a sufficient indication of an intention of the parties that the ordinary principle should not prevail with respect to the mortgagor (*f*).

But this principle is apparently not applicable to cases falling under the Dekkhan Agriculturists' Relief Act (Act XVII of 1879), for it has been held that under that Act an agriculturist mortgagor may sue for an account and possession of mortgaged property before the time fixed in the mortgage deed for the payment of the mortgage debt on the ground that the debt has been satisfied (*g*).

A mortgagor is not entitled to redeem any portion of the property pledged without the whole debt being paid off. A mortgage transaction is one and indivisible, and the mortgagee has a lien over the whole estate, until the whole amount due to him has been paid.

Four villages were together mortgaged for a certain sum: the interest of the mortgagor in two of them was afterwards sold, and the purchaser sued to redeem these two, on payment of what he considered to be the proportion of the advance secured upon them. It was held, that the charge on the four villages could not be broken up,

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(*f*) *Vadju v. Vadju*, I.L.R. 5 Bom. 22. See also the cases there quoted.

(*g*) *Babaji v. Vitlu*, I.L.R. 6 Bom. 734.

and that the mortgagee had a lien on the two, as on the four, for the whole mortgage debt (*h*).

Two mouzahs, each bearing a separate jumma, were mortgaged as a security for an advance of 2,000 rupees. The mortgagor then applied to the Revenue Office for change of registry on behalf of the mortgagee, representing each mouzah to have been pledged for 1,000 rupees. Separate applications were necessary for each mouzah, by reason of their bearing separate jummas in the books. A few days afterwards, the mortgagee applied for registration in the usual form, making no mention of there being any separate advance or lien on *each* mouzah. The Collector, however, issued the usual notification in conformity with the specification of the mortgagor. But the Court nevertheless held that, as the deed conveyed a lien on both mouzahs for the entire loan, neither of them could be redeemed without payment of the whole of the debt (*i*). So, under one instrument (of *zur-i-peshgee* lease) lands were mortgaged to *A* and *B*, redeemable on paying Rs. 225 to *A*, and Rs. 275 to *B*: *A* and *B* took and held possession of the lands in moieties: and it was held that the mortgagor could redeem and recover possession of neither moiety without paying off the whole amount secured, *i.e.*, the Rs. 225 to *A*, and the Rs. 275 to *B* (*j*). So when the rights of the mortgagor have passed to two persons in certain shares, neither of these persons is entitled to redeem without paying off the whole debt (*k*). So again where a mortgagee

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(*h*) *Baul Gobind Singh v. Rae Ramkishun Doss*, S.D.A., 1851, p. 288; *Hurreehurram Tewaree v. Ramsuhoye Roy*, S.D.A., 1859, p. 823.

(*i*) *Khyalee Ram v. Ramdyal*, S.D.A. N.W.P., 1853, p. 473.

(*j*) *Shaikh Imam Ali v. Oograh Singh*, 22 W.R. 262.

(*k*) *Maharanees Wuzuroonissa v. Beebee Saeedun*, 6 W.R. 240; see also *Boodhoo Singh v. Kishen Chunder Ghose*, 3 W.R. (Misc.) 4; *Ram Kristo Manjhee v. Mussamut Ameeroonissa Bibee*, 7 W.R. 314.

had obtained a decree on his mortgage, in execution of which he had attached and brought to sale a portion of the mortgaged property, which was in the possession of a purchaser under a money decree which had been obtained against the mortgagor, it was held in a suit by the mortgagee to eject the purchaser, that the latter was not entitled to redeem the lands in suit on payment of a proportionate amount of the mortgage decree (*l*).

But if the mortgage is of several different mouzahs, and the deed specifies how much money is advanced on each particular mouzah, and there is a stipulation that each may be redeemed on paying off the amount due in respect of it, —in such a case of course the mortgagor may redeem piecemeal (*m*).

A mortgagor may redeem part of the property pledged if the debt for which the whole was mortgaged has been satisfied. Two mouzahs were mortgaged as security for one sum, and the equity of redemption in one of these mouzahs was afterwards sold. The purchaser was held to be entitled to sue to redeem the mouzah he had bought, on the ground that the whole mortgage debt had been paid off from the usufruct of the two: and this, although the other mouzah had several years before been sold by the mortgagor to the mortgagee (*n*).

And the indivisibility of a mortgage transaction may be destroyed by the mortgagee's own conduct. So where the equity of redemption of different plots of land in the possession of an usufructuary mortgagee under one entire contract had been sold to two different persons, and the mortgagee had

(*l*) *Timmappa v. Lakshamma*, I.L.R. 5 Mad. 385.

(*m*) *Sheo Golam Singh v. Ram Roop Singh*, 23 W.R. 25.

(*n*) *Khyleeram v. Ramdyal*, S.D.A. N.W.P., 1855, p. 51; *Nawaab Ahmed Ali Khan v. Jawahir Singh*, 1 N.W.P. (Agra) H.C. 3; *Hurdeo v. Ganeshee Lall*, 1 N.W.P. (Agra) H.C. 36; *Lalla Daibee Pershad v. Beharee Lall*, 4 N.W.P. (Agra) H.C. 33.

abandoned his possession of one plot, and taken a lease from the purchaser of that plot, the Madras High Court held that as the mortgagee had thereby destroyed the indivisibility of the original contract, the purchaser of the other plot was entitled to redeem his land on payment of a proportionate amount of the mortgage debt (o).

A mortgage debt being indivisible, no one or more of several common mortgagors, nor the purchaser from any of them, is entitled to redeem until the whole mortgage debt is paid (p).

But when two or more persons, being co-sharers, join in making a common mortgage, any one of them may redeem the property mortgaged, on payment of the whole sum due. And so may the purchaser of the rights of one of several mortgagors (q).

The mortgagor who comes forward and redeems, obtains possession of the whole property, leaving it to the co-mortgagors, who do not join in redeeming, to recover their shares from him, on paying their proportion of the mortgage debt and of the expenses incurred in redeeming (r).

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(o) *Marana Ammanna v. Pendyala Perubotulu*, I.L.R. 3 Mad. 230.

(p) *Boodhoo Singh v. Kishen Chunder Ghose*, 3 W.R. (Misc.) 4; *Hurlal Mehtoon v. Balgobind Singh*, S.D.A., 1858, p. 1460; *Khajah Ali Reza v. Juboo Singh*, S.D.A., 1860, vol. 1, p. 482; *Oomrao Khan v. Hashkman*, S.D.A. N.W.P., 1860, p. 84; and compare the Transfer of Property Act, 1882, s. 60, last paragraph.

(q) *Mirza Ali Reza v. Tarasoonderree*, 2 W.R. 150; *Ram Kristo Manjhee v. Mussamut Ameeroonissa Bibee*, 7 W.R. 314; *Hurdeo v. Ganeshee Lall*, 1 N.W.P. (Agra) H.C. 36; *Thakoor Bhurt Singh v. Keshoo*, S.D.A. N.W.P., 1851, p. 328; *Buddun Ghir v. Ramjeawun Kirtah*, S.D.A. N.W.P., 1846, p. 81; and see the cases in the next note.

(r) *Sadhoo Lall v. Naeema Beebee*, 3 Sel. Rep. 159; *Syad Urshud Allee Khan v. Syud Imjad Allee*, 7 Sel. Rep. 53; *Kureem Yar v. Tora Singh*, S.D.A. N.W.P., 1853, p. 481; *Mohumed Abdool Juleel v. Mussumat Mehnoo*, S.D.A. N.W.P., 1853, p. 518; *Bhyroo Singh v.*

The joint mortgagors who redeem have a lien on the property for the costs they have incurred in redeeming and getting possession. And there is no need for them to institute a suit to establish that lien (s).

It has been held by the Allahabad Court that the purchaser of the rights of one of several joint mortgagors who has paid off the whole mortgage debt in order to save the estate from foreclosure or sale, can claim from each of the other mortgagors a contribution proportionate to his interests in the property (t), or can recover the amount he has so paid by bringing the shares of each of such joint mortgagors to sale (u).

The English law on this subject is similar to that prevailing here. If the equity of redemption be the property of several persons as joint tenants, or tenants in common, one of them may redeem: each as against an incumbrancer, and subject to account with his co-tenant, being entitled to possession and receipt of the whole rents (v).

There is one case which may seem to cast doubt on the right of one of several mortgagors to redeem the whole property mortgaged. It was there held that a tender of the amount due on the mortgage, by one or more of several mortgagors, is not a tender which a mortgagee is bound to accept unless made conjointly by the whole of the mortgagors

*Nuthoo Singh*, S.D.A. N.W.P., 1854, p. 525; *Khoman Singh v. Seekishun*, S.D.A. N.W.P., 1854, p. 543; *Jowahir Singh v. Chowbe Beeharee Loll*, S.D.A. N.W.P., 1855, p. 378; *Chutterdharee v. Pudaruth Singh*, S.D.A. N.W.P., 1856, p. 77.

(s) *Chutterdharee v. Pudaruth Singh*, S.D.A. N.W.P., 1856, p. 77; and compare the Transfer of Property Act, 1882, s. 95.

(t) *Hira Chand v. Abdal*, I.L.R. 1 All. 455.

(u) *Pancham Singh v. Ali Akmad*, I.L.R. 4 All. 58.

(v) 2 Fisher's Law of Mortgage, 3rd Ed., p. 756; and see the remarks of West, J., in *Gan Savant Bal Savant v. Narayan Dhond Savant*, I.L.R. 7 Bom. 467, (cf. p. 472.)



or on their behalf and with their consent (*w*). But this decision cannot be supported if it goes further than to lay down that in a suit for redemption all the mortgagors—all those in whom the equity of redemption or any portion of it is vested—are necessary parties (*x*).

Though a mortgagee is entitled to say to each of several persons who have succeeded to the mortgagor's rights, that he shall not redeem a part of the property on payment of part of the debt, because the whole and every part of the land mortgaged is liable for the whole debt,—still a mortgagee who has by purchase acquired a part of the mortgagor's interest, cannot throw the whole burden of the mortgage debt on the remaining portion of the equity of redemption in the hands of one who has purchased it at a sale in execution of a decree against the mortgagor. Each has bought subject to a proportionate share of the burden, and must discharge it. Thus, there being a mortgage of sixteen villages, the mortgagor's equity of redemption was afterwards sold in lots in execution of decrees against him. The mortgagee became the purchaser (at these sales) of the mortgagor's interest in  $12\frac{3}{4}$ ths out of the sixteen villages. The  $3\frac{1}{4}$  villages remaining were sold in four separate lots to four different purchasers. The purchaser of one of these four lots was held to be entitled to redeem the village comprised in the lot purchased by him, upon paying such a sum as represented the portion of the mortgage debt chargeable on that village. But it was held that he could not insist on redeeming any village save that which he had himself purchased: and that the mortgagee, if desirous of retaining possession of the other villages as

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(*w*) *Ram Balsh Singh v. Mohunt Ram Lall Doss*, 21 W.R. 428; and see *Prannath Roy Chowdhry v. Rookea Begum*, 7 Moore's I.A. 323.

(*x*) As to this see Act XIV of 1882, s. 32, and compare the Transfer of Property Act, 1882, s. 85.

mortgagee, was entitled to do so,—the right of the purchaser of one of the four lots being limited to the redemption and recovery of the village forming that lot (y).

So when two mouzahs were mortgaged together, and the equity of redemption in one was subsequently sold in execution of a decree held by a stranger, and was purchased by the mortgagee, and the equity of redemption in the other was in like manner sold under another decree and purchased by a third party, it was held that the latter might redeem the property he had purchased on paying a proportionate part of the mortgage debt (z).

Again where all the proprietors of an estate joined in mortgaging it, and the mortgagee subsequently purchased the share in such estate of one of the mortgagors, thereby breaking the joint character of the mortgage, and one of the mortgagors sued to redeem his own share and also the share of another of the mortgagors, it was held that he was entitled to redeem his own share, but not that of his co-mortgagor, against the will of the mortgagee (a).

But where the equity of redemption of a share of one of the mortgagors in the mortgaged property has been acquired

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(y) *Nawab Azimut Ali Khan v. Jowahir Sing*, 13 Moore's I.A. 404; S.C. 14 W.R. (P.C.) 17;—varying the decree made by the Agra Court in *Nawab Ahmed Ali Khan v. Jawahir Singh*, 1 N.W.P. (Agra) H.C. 3; see also *Bekon Singh v. Baboo Deen Dyal Lall*, 24 W.R. 47; *Chunder Nath Mullick v. Nilakant Banerjee*, I.L.R., 8 Calc., 690 (cf. p. 699); and compare the Transfer of Property Act, 1882, s. 60, last paragraph, exception.

(z) *Mahtab Singh v. Misree Lall*, 2 N.W.P. (Agra) H.C. 88; see also *Bitthul Nath v. Toolsee Ram*, 1 N.W.P. (Agra) H.C. 125; *Kesree v. Seth Roshun Lal*, 2 N.W.P. (All.) H.C. 4; *Nathoo Sahoo v. Lallah Ameer Chand*, 15 B.L.R. 303; S.C. 24 W.R. 24.

(a) *Kuray Mal v. Puran Mal*, I.L.R. 2 All. 565. The value of the subject-matter of a suit by one of several mortgagors to recover his share on the ground that the mortgage has been redeemed, is the value of the mortgagee's right *quâ* the plaintiff's share; *Bahadur v. Nawab Jan*, I.L.R. 3 All. 822.

by one only of several mortgagees, this rule does not apply, and another of the mortgagors has no right to redeem his share of the mortgaged property by payment of a proportionate part of the mortgaged debt (b).

Again, though the purchaser of a share of the equity of redemption is at liberty to insist that his share shall be burthened with no more than a proportionate amount of the original mortgage debt, and may claim to redeem his share upon payment of that amount, yet where he did not show what that proportion was, nor pay it into Court, the Calcutta High Court allowed the holder of a decree upon a mortgage bond to enforce an attachment under his decree against such share for the whole amount of his judgment debt (c).

It has been held by the Madras High Court that where a mortgagee in possession acquires a right to a share in the property mortgaged, he cannot be compelled to surrender the mortgaged property on payment of the debt, or any part of it on payment of a proportionate amount of the debt, until the mortgagor has by a proper suit for partition ascertained definitely the shares of the co-owners. Where therefore in such a case the mortgagor merely sued for the redemption of the mortgaged property, the Court held that the plaintiff could not be allowed to redeem the whole property inasmuch as the effect of that would be to enable the plaintiff to get possession of the whole property to the exclusion of the mortgagee, who had a share in the right to redeem and could not be required to surrender possession of the whole against his consent, until the plaintiff had, by a proper suit for partition, ascertained definitely to what shares he and the mortgagee were respectively entitled; whilst a decree for redemption of portion of the mortgaged property was equally impossible, for that would be to convert the

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(b) *Mahtab Rai v. Sant Lal*, I.L.R. 5 All. 276.

(c) *Hirdy Narain v. Syed Allaoolah*, I.L.R. 4 Calc. 72.

suit into one for partition, which, without the consent of all the parties interested, could not be permitted (d).

It has also been held by the Madras High Court, following the doctrine of Courts of Equity in England, that the purchaser of the equity of redemption of part of an estate under mortgage is entitled to redeem the whole of the mortgaged estate if the mortgagee insist on his right to have it so redeemed. When the purchaser elects to pay the entire mortgage debt, he puts himself in the place of the mortgagee redeemed, and acquires a right to treat the original mortgagor as *his* mortgagor, and to hold that portion of the estate, in which he would have no interest but for the payment, as a security for any surplus payment he may have made. Thus where the purchaser at a Court sale of the right, title and interest of the mortgagor in a village, which was mortgaged jointly with another village, sued to redeem both villages, and it appeared that he had first sued for possession of the village he had purchased and tendered the proportionate mortgage debt, but this suit was, at the instance of the defendant, dismissed on the ground that the mortgage of the two villages was an indivisible security, the Court held that the plaintiff was entitled to recover both villages, and to hold the village which was not included in his purchase as security for the surplus payment he might have had to make to render his purchase effectual (e).

When a sharer in a property mortgages not only his own share, but that of a co-sharer, without his consent, the latter should sue to have the mortgage set aside, so far as it regards his share. He ought not to sue to redeem; for, by so doing, he admits that there is a valid mortgage of his share (f).

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(d) *Mamu v. Kuttu*, I.L.R. 6 Mad. 61.

(e) *Asansab Ravutham v. Vamana Rau*, I.L.R. 2 Mad. 223.

(f) *Khoman Singh v. Seekishun*, S.D.A. N.W.P., 1854, p. 543.

But although when a mortgage of an entire estate has been executed by several proprietors in one and the same transaction, an action by one proprietor to redeem his own peculiar share on paying his proportion of the loan, will generally not lie, yet it has been said that this rule is not without exception, and cases may occur, in which for special reasons, its enforcement may not be considered proper (g).

The rule that one of several common mortgagors may redeem the whole estate, and that he cannot redeem his own share *only*, does not apply, when it appears clearly on the face of the mortgage deed that the mortgagors have each of them separate and distinct shares in the mortgage. In such a case they have no claim on the mortgagee beyond the interests which they have themselves recorded, and it would seem that each mortgagor must redeem his own share, and that there can be no success in a suit to redeem the whole property, unless all the parties to the contract join in it (h).

There can be no redemption after foreclosure has taken place; for on foreclosure all the rights cease which the mortgagor had in the property pledged. And a suit for redemption instituted after foreclosure has been completed must fail, except when the foreclosure is successfully impeached and set aside.

A mortgagee executed an agreement to the effect that if the mortgagor would consent to his obtaining a decree

(g) *Bhowanee Dihul Rai v. Bisheshur Pershad Singh*, S.D.A. N.W.P., 1853, p. 591.

(h) *Mulik Basah v. Mussumat Dhana Beebee*, S.D.A. N.W.P., 1850, p. 220; *Khoman Singh v. Seekishun*, S.D.A. N.W.P., 1854, p. 543; *Jowahir Singh v. Chowbe Beeharee Loll*, S.D.A. N.W.P., 1855, p. 378; *Ram Kristo Manghee v. Mussamut Ameeroonissa Bibee*, 7 W.R. 314; see also *Syud Urshud Allee Khan v. Syud Imjad Allee*, 7 Sel. Rep. 53.

for foreclosure, he would afterwards restore the estate to him on certain conditions. He then brought a foreclosure suit, and the mortgagor allowed a decree to pass in his favor. But the mortgagor afterwards instituted a suit to redeem, as the mortgagee refused to fulfil his contract. The Court held that his suit must be dismissed. "If the mortgagor were minded to enforce any agreement whatever with respect to his property, it was indispensably necessary that he should have done so, before suffering the property to pass absolutely away from him. Having suppressed his agreement during the suit for foreclosure, he is not in a position to prefer any legal or equitable claim to benefit therefrom" (i). In such a case, however, if the mortgagor could prove distinct fraud on the part of the mortgagee, he would doubtless be able to get the foreclosure set aside upon that ground.

It may happen that a mortgagee in possession is entitled to possession in more characters than one,—that he has some other title, as well as that of mortgagee. In such a case a suit for redemption will not lie.

A sum of money having been advanced for the payment of arrears of Government revenue due on a certain *puttee*, the lender was put in possession for five years as mortgagee. At the end of that period, a further sum was due for arrears, which the mortgagee paid up, obtaining a further mortgage for ten years. About the time when this second lease was granted, the revenue officers were making a new settlement of the district, and they made it, in respect of the mortgaged *puttee*, with the mortgagee and not with the mortgagor, the settlement being renewed with the mortgagee as farmer of the *puttee*, for twenty years. A suit for redemption and recovery of possession was brought

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(i) *Buddeoolzumah v. Baneepershad*, S.D.A. N.W.P., 1850, p. 294; and compare the Transfer of Property Act, 1882, s. 60, proviso.

by the mortgagor at the date named as the end of the second lease, but it was held that, as the mortgagee then claimed not as mortgagee but as farmer under the settlement, a suit for redemption would not lie until the termination of his farm : the settlement, if bad, must first be set aside (*j*).

So, *A* who held from the Government a farming lease of *B*'s lands, advanced a sum of money to him, and received as security for the debt a mortgage of the same property. By the terms of the mortgage contract, *A* was to have immediate possession and registry, and *B* was declared entitled to redeem after the expiration of ten years. At the close of that period, *B* sued to redeem and for possession ; but he failed, on the ground that *A* was in, not as mortgagee, but as Government lessee (*k*).

The mere settlement of a resumed *maafee* estate with the mortgagee does not destroy the mortgagor's right to redeem, nor does it necessarily make the holding by the mortgagee a holding adverse to the mortgagor's right (*l*).

It has been held in Madras that where land has been mortgaged and, while in the possession of the mortgagee, sold for arrears of revenue under Madras Act II of 1864 (Rent Recovery Act) and purchased by the mortgagee at the revenue sale, such sale does not necessarily deprive the mortgagor of his right to redeem (*m*).

Where a mortgage contract has been made the subject of adjudication by the Civil Court, and a decree has been passed, the contract is thereupon merged in the decree

(*j*) *Jahan Khan v. Khajeh Ali Khan*, S.D.A. N.W.P., 1851, p. 176.

(*k*) *Jehan Khan v. Khoojah Ali Khan*, S.D.A. N.W.P., 1853, p. 59.

(*l*) *Musst. Oomrao Begum v. Musst. Nizam-oon-nissa*, 1 N.W.P. (Agra) H.C. 224 ; see also *Ram Dial v. Shah Baz Khan*, 1 N.W.P. (Agra) H.C. 15, and *Mahomed Ata-aol-lah v. Mahomed Mokib-aol-lah*, 1 N.W.P. (Agra) H.C. 231.

(*m*) *Lakshmaya v. Appadu*, I.L.R. 7 Mad. 111.



and the Court is not at liberty in a subsequent suit to go behind the previous decree. Thus where the plaintiff mortgaged certain land to the defendant in 1864 and in 1874, the defendant obtained a decree against the plaintiff upon the mortgage, ordering the plaintiff to pay the defendant the sum of Rs. 40, and in default of payment, the defendant was to take possession of the land until the said sum should be paid, and in pursuance of the decree the defendant took possession, it was held in a subsequent suit by the plaintiff to redeem the land, on the ground that the amount of the mortgage debt had been fully liquidated out of the surplus profits of the land, that the defendant was not liable to account to the plaintiff for such profits. Under the former decree the defendant was entitled to take possession, and retain it with the attendant benefits until the plaintiff should pay a definite sum which he had not paid. The defendant held under the decree a complete title to the land until such payment was made (n).

Under the old law of limitation a mortgagor was never barred by mere lapse of time, from recovering his property, whether real or personal. The rule that suits were cognizable only within twelve years from the time when the cause of action arose, was applicable only when the possession of the occupant had been under a title *bonâ fide* believed to have conveyed a right of property to the possessor,—which the possession of a mortgagee never can be. The words of the old Regulation, which applied to deposits or pledges of money or other personal property, as well as to land are:—"Provided that no length of time shall be considered to establish a prescriptive right of property, or to bar the cognizance of a suit for the recovery of property, in cases of mortgage or deposit, wherein the occupant of

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(n) *Novlu v. Raghu*, I.L.R. 8 Bom. 303 ; see also *Tatya Vithoji v. Bapu Balaji*, I.L.R. 7 Bom. 330.

the land or other property may have acquired or held possession thereof as mortgagee or depository only, without any proprietary right; nor in any other case whatever, wherein the possession of the actual occupant, or of those from whom his occupancy may have been derived, shall not have been under a title *bonâ fide* believed to have conveyed a right of property to the possessor" (o). So that mere efflux of time would not, under the old law, of itself bar the right to redeem a mortgage (p).

And therefore, when, after a lapse of many years, the representative of the mortgagor sued to redeem, the fact that neither he, nor his father, nor his grandfather, all of whom in turn represented the original mortgagor, were ever in possession of the property, was held to be no ground of objection to his succeeding in his claim (q). But this applied only to the right to redeem; and if, after the mortgage debt had been in fact paid off from the usufruct, the mortgagor waited more than twelve years before advancing his claim to possession, he was not allowed *wasilat*, or *mesne profits*, except for the twelve years immediately preceding the institution of his suit,—in like manner as under

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(o) Ben. Reg. II of 1805, sec. 3, cl. 4; and for the law in Madras and Bombay see Mad. Reg. II of 1802, sec. 18, cl. 4, and Bom. Reg. V. of 1827, sec. 8.

(p) *Muddun Gopal Singh v. Lalla Hunooman Dobay*, W.R. Sp. 37; *Muhronnissa Khanum. v. Mussumaut Budamoon*, 1 Sel. Rep. 185; *Bulraj Rai v. Pertaub Rai*, 2 Sel. Rep. 4; *Petition No. 610 of 1853*, S.D.A., 1853, p. 975; *Petition No. 954 of 1853*, S.D.A., 1854, p. 400; *Rampersad Sookul v. Sheikh Gouhur Allee*, S.D.A., 1859, p. 1135; *Baboo Kunhya Lal v. Syud Dad Allee*, S.D.A., 1859, p. 1273; *Ram Buksh v. Gunja Pershad*, S.D.A. N.W.P., 1851, p. 203; *Vanneri Purushottaman Nambudri v. Patanattil Kurju Menavan*, 2 Mad. H.C. 382.

(q) *Ramsurrun Singh v. Mussumat Soobutchna*, S.D.A. N.W.P., 1848, p. 187; see also *Mussamat Mohasha v. Mussamat Khoonoo*, W.R., 1864, p. 68.

similar circumstances, he could not claim the amount due on a bond, or the rent accrued on land (*r*).

It was only in a *mere* redemption suit that the mortgagor had the benefit of this exception to the ordinary rule of limitation. When a suit was brought to set aside a mortgage deed, it being denied by the alleged mortgagor that he ever gave a mortgage at all, the case was held not to come within the exception (*s*). And when a party had been admitted by the revenue authorities to a settlement as proprietor under a *birt* title, it was held that a suit to redeem the land, on the ground that the title of the person so admitted to the settlement was really only that of mortgagee, must be brought within twelve years from the date of the order of the Revenue officers (*t*).

So where the original possession was admitted to have been as of mortgagees, but the mortgagees had at the settlement been entered on the register as zemindars, without any assertion of title on the part of the mortgagors, it was held that a redemption suit brought more than twelve years after such settlement, was barred: that it was in fact not a redemption suit, but a suit to reverse the settlement, which could not be reversed after such a lapse of time (*u*).

The soundness of these last two cases, however, is questionable (*v*). And it has been held that when a settlement of rent-free land was made with a mere mortgagee in his

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(*r*) *Mehur Dass v. Hajee Mohamed Imam Buksh*, S.D.A. N.W.P. 1849, p. 298; *Ruttun Muneer Dassea v. Sunkuree Dassea*, 6 Sel. Rep. 231; *Radhamohun Ghose Choudree v. Ram Chand Mustofee*, 7 Sel. Rep. 182.

(*s*) *Musst. Khedun Kooar v. Muhabil Singh*, S.D.A., 1859, p. 304; see also *Baboo Kunhya Lal v. Syad Dad Alee*, S.D.A., 1859, p. 1273.

(*t*) *Mulhoo Pandey v. Sheochurn Lall*, S.D.A., N.W.P. 1853, p. 136.

(*u*) *Sheosurrin Raee v. Buldeo Singh*, S.D.A. N.W.P., 1855, p. 443.

(*v*) *Muddun Gopal Singh v. Lalla Hunooman Dobay*, W.R. Sp. 37.

character of mortgagee, his possession, under the settlement, was not adverse to the mortgagors (*w*).

The law of limitation at present in force is to be found in Act XV of 1877, which applies to all suits for redemption instituted on or after the 1st of October 1877. It is, except as hereinafter noticed, generally similar in its provisions, so far as redemption is concerned, to Act IX of 1871 and Act XIV of 1859 which were applicable to suits instituted on or after the 1st April 1871 and the 1st of January 1862 respectively.

In suits against a mortgagee to redeem or to recover possession of immoveable property mortgaged, the period of limitation is sixty years. Limitation runs from the time when the right to redeem or to recover possession accrues, unless when an acknowledgment of the liability of the party against whom the right is claimed, has, before the expiration of the prescribed period, been made in writing, signed by such party or by some person through whom he derives liability. When there has been such an acknowledgment, then the time begins to run from the time when the acknowledgment was so signed. And when the writing containing the acknowledgment is undated oral evidence may be given of the time when it was signed, but oral evidence of its contents may not be received. An exception is made as to mortgages of immoveable property in British Burma executed before the 1st of May 1863: and claims to redeem such mortgages are governed by the rules of limitation in force in that province immediately before the 1st of May 1863 (*x*).

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(*w*) *Ram Dial v. Shah Baz Khan*, 1 N.W.P. (Agra) H.C. 15; see also *Mahomed Ata eo'-lah v. Mahomed Mohib-ool-lah*, 1 N.W.P. (Agra) H.C. 231; *Ramaisher Singh v. Saiva Zalim Singh*, 2 N.W.P. (Agra) H.C. 8.

(*x*) Act XV of 1877, Sch. II, Art. 148 and sec. 19; and compare Act IX of 1871, Sch. II, Art. 148, and Act XIV of 1859, sec. 1, cl. 15.

It is expressly provided by the Acts of 1871 and 1877 that an acknowledgment, in order to prevent the right of redemption being barred, must be signed before the claim has become barred by the lapse of the prescribed period (y).

And it has been held by the Madras High Court that the law was the same under Act XIV of 1859, the words "in the meantime" in clause 15 of sec. 1 of that Act meaning within sixty years of the date of the mortgage. So where an acknowledgment of a mortgagor's right to redeem a mortgage executed in 1761 was made in writing in 1838, the Court held that a suit to redeem in 1878 was barred. The right to sue to redeem the mortgage became barred in 1862 when Act XIV of 1859 came into force, and neither Act IX of 1871 nor Act XV of 1877 was designed to revive any right which had previously become extinct. Moreover, the term "the prescribed period" in these Acts refers to the period prescribed by the Act which governs the suit and not the period prescribed by the law in force at the date of the acknowledgment (z).

But a different view on this point would appear to be held by the Allahabad Court, for it has ruled that the provisions of clause 15 of sec. 1, Act XIV of 1859, relating to suits against a mortgagee for the recovery of immovable property mortgaged, were modified by Art. 148, Sch. II of Act IX of 1871, principally in this respect, that the acknowledgment in writing of the mortgagor's title or right of redemption, from the date of which a new period of limitation is allowed to commence, is required to be made within the period of limitation originally prescribed and reckoned from the date of the mortgage. And the reason for this provision was stated by the Court to be

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(y) Act IX of 1871, Sch. II, Art 148; and Act XV of 1877, sec. 19.

(z) *Mukhanni v. Manan*, I.L.R. 5 Mad. 182; see also *Vassudavan Nambudiri v. Mussa Kutti*, 6 Mad. H.C. 138.

discoverable by reference to sec. 29 of the last mentioned Act, which declares that at the determination of the period limited to any person for instituting a suit for possession of any land, his title to such land shall be extinguished (a), the intention of the Legislature being apparently to allow a further period of limitation to run from the date of an acknowledgment, not of rights already extinct, but only of rights still subsisting. So when in a suit for redemption of immoveable property, the plaintiffs, representatives of the mortgagor, relied on an acknowledgment of the mortgagor's title contained in an entry in the settlement records of the year 1841, which was attested by the representatives of the mortgagees, defendants in the suit, and the lower Courts had differed as to whether the acknowledgment was sufficient without proof that it was made within sixty years from the date of the alleged mortgage, the High Court held that, inasmuch as there was no limitation to suits for redemption of immoveable property prior to Act XIV of 1859, it was unnecessary to ascertain when the mortgage was effected, the acknowledgment of 1841 being an acknowledgment of a right still subsisting and therefore one which fulfilled the requirements of Art. 148, Sch. II, Act IX of 1871 (b).

In cases to which the Acts of 1859 and 1871 are applicable the signature must be that of the mortgagee himself. In one case, the mortgagor in 1846 sued to redeem, and the mortgagee successfully resisted the claim. Many years afterwards another suit was brought by the mortgagor's representatives, to recover possession. It was contended that an acknowledgment within the meaning of cl. 15 of sec. 1 of Act XIV of 1859 saved the suit from

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(a) Compare Act XV of 1877, sec. 28.

(b) *Daia Chand v. Sarfras Ali*, I.L.R. 1 All. 425.

being barred. The acknowledgment relied on was said to be contained in two documents,—a mookhtarnama to a person to appear (for the mortgagee) and defend the suit in 1846, and a written statement filed by that person in that suit, which written statement contained an acknowledgment of the title of the mortgagor and of his right to redeem. The Privy Council held it was impossible to put the two documents together so as to satisfy the requirements of the Act, and added,—“It was argued that the signature of an agent was sufficient, and that the mookhtar being authorised to defend the suit and to use such arguments as he thought fit, authority was given to him to make an acknowledgment of title, and that such an acknowledgment having been made and signed by him, the Statute was complied with. Their Lordships think that is not so. The Statute must receive a construction according to its plain words. It requires the signature of the party himself, namely, the mortgagee: and it would be a wrong construction of it to hold that any other signature would satisfy these words” (c).

But the present law is different, and, as it would seem, more equitable. Under it the signature need not be that of the mortgagee himself. It may be either that of the mortgagee or of an agent duly authorized in this behalf (d). With reference to this provision it has been held by the Bombay High Court that an acknowledgment of the mortgagor's right to redeem, which under the earlier Acts is insufficient to keep alive a cause of action because it was signed only by an agent, is equally insufficient to sustain a suit on the same cause of action under Act XV of

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(c) *Luchmee Bulsh Roy v. Runjeet Ram Panday*, 13 B.L.R. 177 (P.C.) ; and see *Rahmani Bibi v. Hulasa Kuar*, I.L.R. 1 All. 642, which was a case under Act IX of 1871.

(d) Act XV of 1877, sec. 19, explanation 2.



1877, as sec. 2 of that Act expressly bars the revival of a right to sue barred under the earlier Acts (e).

An acknowledgment may be sufficient though made to one who is not the mortgagor and who is not himself entitled to the mortgaged property. Thus when the mortgagees had attested as correct the "record of rights" prepared at a settlement with them of an estate, in which they were described as mortgagees, but which did not mention the name of the mortgagor, this was held to be an acknowledgment by the mortgagees of the mortgagor's right to redeem within the meaning of Art. 148 of Sch. II of Act IX of 1871 (f).

But it has been held that an acknowledgment to be within the meaning of Art. 148 of the Act of 1871, must be an acknowledgment of a present existing title in the mortgagor. Thus an acknowledgment of the original making of the mortgage-deed and of possession having been taken under it, coupled with the allegation of the subsequent execution of two other deeds practically superseding the mortgage and altering the relation of the parties, contained in a written statement filed previous to the expiry of the 60 years allowed, is not a sufficient acknowledgment within the

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(e) *Dharma Vilhal v. Govind Sadvalkar*, I.L.R. 8 Bom. 99. It would seem from certain remarks in the judgment (*cf.* p. 103), that the Court thought that sec. 20 of Act IX of 1871 applied to an acknowledgment of the mortgagor's right to redeem, but it will be seen from a reference to the section that it only applied to an acknowledgment in respect of a debt or legacy; and compare Sch. II, Art. 148 of the same Act. The correctness of the observations in the same judgment as to the effect of the last clause of sec. 20 of Act XV of 1877 in saving the right of redemption seems also open to question.

(f) *Data Chand v. Sarfraz*, I.L.R. 1 All. 117. See also *Dur Gopal Singh v. Kosheeram Panday*, 3 W.R. 3 (under Act XIV 1859); *Narraina Tantri v. Ukkoma*, 6 Mad. H.C. 267; and see *Valampuducherri Padmanabham Numbudri v. Chowakaren Pudiapurayil Kunhi Kolendan*, 5 Mad. H.C. 320.

meaning of the article, so as to prevent limitation from operating (g).

In a recent case which came before the Bombay High Court the facts were that the plaintiff's ancestor mortgaged a piece of land to the defendant's ancestor in 1797, and placed him in possession as agreed upon. Three years afterwards both the mortgagor and the mortgagee went out of the country. The mortgagor returning first resumed possession of the land; the mortgagee returning afterwards filed a suit in 1826 to recover possession under the terms of the mortgage, and, obtaining a decree in his favour, possession was restored to him by the Civil Court in 1827. When taking delivery of the possession from the Court, the mortgagee passed to the officer of the Court a receipt in which he acknowledged having received possession of the mortgaged land as directed by the decree. The plaintiff, the representative of the original mortgagor, on the 4th December 1880 sued the defendant, the representative of the original mortgagee, to redeem the land. The Court held that the suit was barred. The receipt incorporating the decree by reference did not operate as an acknowledgment of a mortgage subsisting in 1827, so as to give to the mortgagor a new period of limitation under sec. 19 of Act XV of 1877. That section intends a distinct acknowledgment of an existing liability or jural relation, not an acknowledgment without knowledge that the party is admitting anything (h).

It has been held by the Madras High Court that the mere acceptance of a sale certificate, granted by the Court to the purchaser of a mortgagee's interest in land sold by auction in satisfaction of a decree, is not an acknowledgment, by the purchaser, of the title of the mortgagor which will satisfy the conditions of sec. 19 of Act XV of 1877,

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(g) *Ram Das v. Birjundun Das*, I.L.R. 9 Cal. 616; and compare Expl. I of sec. 19 of the present Act.

(h) *Dharma Vithal v. Govind Sadvalkar*, I.L.R. 8 Bom. 99.

and give a fresh starting point from which limitation will run for redemption (i).

So long as the suit is brought strictly within the prescribed period of limitation, the laches of the mortgagor is immaterial. The laches of the parties cannot estop them from asserting their right, if it exists. "The question is one of title, and the right to assert that title is to be determined by the law of limitation as it stands. The law, wisely or unwisely, has given to the mortgagors the long period of sixty years within which to bring their suit: and no Court of Justice would be justified in diminishing that period on the ground of the laches of a party in the prosecution of his rights" (j).

A suit for the redemption of an usufructuary mortgage falls within the sixty years' limitation,—although (as is always the case in such mortgages) the possession of the mortgagee until payment of the debt is consistent with the original intention of the parties. In one case it was contended that a limitation which ran from the date of the mortgage could not apply to an usufructuary mortgage. The Privy Council held that the rule of limitation was enacted in the most general terms and in language sufficiently large to embrace every kind of mortgage. "There can be no doubt it was deliberately done, and that the provision found in the 4th cl. of sec. 3 of Reg. II of 1805 which excluded cases of mortgages or deposit from the Regulations relating to limitation was designedly set aside,—a different policy prevailing with those by whom" Act XIV of 1859 was passed (k).

The sixty years' rule applies only to suits to redeem or to recover possession of the property. Where a mortgagor,

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(i) *Raman v. Krishna*, I.L.R. 6 Mad. 325.

(j) *Juggernath Sahoo v. Syud Shah Mahomed Hossein*, L.R. 2 I.A. 48; S.C. 14 B.L.R. 386.

(k) *Luckmee Buksh Roy v. Runjeet Ram Panday*, 13 B.L.R. 177 (P.C.).

after the mortgage has been satisfied, sues for surplus collections received by the mortgagee, the suit is governed by the six years' rule of limitation prescribed by cl. 16 of sec. 1 of Act XIV of 1859; for after the mortgage has been satisfied, the mortgagee cannot be considered to be in the position of a trustee for the mortgagor, within the meaning of sec. 2 (l).

And this view has been adopted by the Legislature in the Limitation Acts of 1871 and 1877 (m). Art. 105 of Sch. II of the former Act rendered such claims subject to the limitation of three years calculated from the date of the receipt of the surplus profits, but in the present Act the corresponding article, whilst retaining the period, has introduced an important alteration by rendering the period of limitation computable from the date "when the mortgagor re-enters on the mortgaged property" (n).

When a mortgagee in possession has endeavoured by litigation to establish an absolute title in himself inconsistent with the mortgage, and has failed, his possession during the litigation, although extending over a period of more than twelve years, cannot be deemed adverse to the mortgagor (o).

The mere assertion of an adverse title by a mortgagee in possession does not make his possession adverse or enable him to abbreviate the period of 60 years which the law allows to a mortgagor to prosecute his right to redeem and seek his remedy by suit. Where accordingly certain immoveable property was mortgaged in June 1854 for a term which expired in June 1874, and in July 1863, the equity of redemption of such property was transferred by sale to the mortgagees by a person who was not competent

(l) *Baboo Lall Doss v. Jamal Ally*, 9 W. R. 187 (F.B.).

(m) See the definition of "trustee" in sec. 3 of each of these Acts.

(n) See *Jaijit Rai v. Gobind Tiwari*, I.L.R. 6 All. 303 (cf. p. 311).

(o) *Tanji v. Nagamma*, 3 Mad. H.C. 137.

to make the transfer, and the mortgagees set up a proprietary title to the property by virtue of the sale, it was held in a suit instituted to redeem the property in March 1877 that the suit was not barred, because it was instituted more than twelve years from the date of the deed of sale (p).

Though the provisions of Art. 148, Sch. II of Act IX of 1871 apply to all persons claiming under the mortgagee, except *bond fide* purchasers for value, whose case is governed by Article 134, they do not apply to suits against strangers nor to suits which are not suits for redemption. Where a plaintiff brought a suit for redemption, it was found that the defendant, who was in possession, did not claim under the mortgagee, and that for more than twelve years before the date of the suit, he had held possession from the Government by a title adverse to that of the plaintiff, it was ruled that Art. 145 and not Art. 148 of Sch. II of Act IX of 1871 applied and therefore that the claim was barred. The Court refused to assent to the contention that so long as the mortgagor is entitled only to the equity of redemption, there can be no invasion of his interest. There are cases in which the rights and interests of the mortgagor and mortgagee are equally invaded, as where under a sale for arrears of revenue a purchaser acquires possession and thenceforward holds adversely both to the mortgagor and the mortgagee, or where the mortgagor has remained in possession and a stranger ousts him from the land. In such cases the mortgagor's remedy does not lie in a suit for redemption, for as between the mortgagor and the alleged wrong-doer there is neither privity of contract nor unity of possession. The mortgagor must sue for the recovery of the interest

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(p) *Ali Muhammad v. Lalta Bakhsh*, I.L.R. 1 All. 655. See also *Sheopal v. Khadim Hossein*, 7 N.W.P. (All.) H.C. 220.

from which he has been ousted within the time allowed for the recovery from trespassers of interests in land (q).

The sixty years' rule does not apply when the relation-ship of mortgagor and mortgagee has been materially altered or has ceased to exist. Thus when notice of foreclosure has once been duly served, the suit of the mortgagor seeking to redeem on the ground that the mortgage debt was paid off before the end of the year of grace, must be brought within twelve years from the expiry of the year of grace (r).

A mortgagee in possession who purchased the mortgaged property at an auction sale for arrears of revenue, which sale was not caused by any fraud or misconduct on the part of the mortgagee, was held to have acquired a new title, so that if the mortgagor desired to dispute it, it was necessary for him to institute his suit within twelve years from the sale (s).

The guardian of certain minors having mortgaged an estate belonging to them and put the mortgagee in possession, subsequently sold the estate out and out to the mortgagee. On a suit being brought by the minors to set aside the sale as not binding upon them, it was held that a separate and distinct cause of action accrued on the sale, and that limitation was not to be reckoned from the date of the mortgage (t).

Where after the expiration of the period prescribed for redemption, the mortgagor and mortgagee agreed that the

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(q) *Ammu v. Ramakishna Sastri*, I.L.R. 2 Mad. 226.

(r) *Lotf Hossein v. Abdool Ali*, 8 W.R. 476. See also *Musst. Luteefun v. Musst. Zoohoorun*, S.D.A., 1854, p. 137; *Nilambur Mujoondar v. Parbutteechnu Mujoondar*, S.D.A., 1859, p. 1494; *Moonshee Kalipershad v. Sheopershad*, S.D.A., 1861, vol. 1, p. 8.

(s) *Bykunt Dhur Singh v. Lalla Bhogobut Sahay*, 2 Hay. 475. See ante pp. 278, 279.

(t) *Tradul Khan v. Debee Dyal*, 1 N.W.P. (Agra) H.C. 180.

mortgagee should continue in absolute possession for a fixed term, and then restore the property free from the mortgage lien; it was held that the agreement was distinct from the original mortgage, and was not intended to be a mortgage, but a conveyance for a term of years, and therefore that a suit to recover the property must be brought within twelve years from the expiration of the term stipulated in the agreement (u).

It has been held by the N. W. P. High Court that when a decree for redemption is obtained, but is not executed within the three years prescribed by sec. 20 of Act XIV of 1859, for the execution of decrees, a fresh suit for possession on redemption will lie. The mortgagee does not cease to be a mere mortgagee, simply because the mortgagor omits to execute his first decree (v).

\*But this decision would appear to be overruled by a late decision of the same Court in which it has been held that where a mortgagor has obtained a decree for possession on redemption, and has by his own neglect lost his right to execution of such decree, he cannot be permitted to revert to the position he held before the institution of that suit and to bring a fresh suit for possession (w).

And these decisions have been followed by the Bombay High Court which has held in a case where the mortgagor had obtained a mere decree for redemption, which did not contain any direction for foreclosure, and had failed to execute the decree within the prescribed time, that the mortgagor was debarred from afterwards bringing a second suit to redeem the same property (x). *Kemball*,

(u) *Gopal Sitaram Gune v. Desai*, I.L.R. 6 Bom. 674.

(v) *Chaita v. Purum Sookh*, 2. N.W.P. (Agra) H.C. 256.

(w) *Anrudh Singh v. Sheo Prasad*, I.L.R. 4 All. 481, following *Sheikh Golam Hoosein v. Mussumat Alla Rukhee Beebee*, 3 N.W.P. (All) H.C. 62 (F.B.)

(x) *Gan Savant Bal Savant v. Narayan Dhond Savant*, I.L.R. 7 Bom. 467.



J.'s, judgment contains the following remarks (y): "By reason of the default in payment of the money declared to be due within the time prescribed by law for the execution of decrees (no time having been fixed in the decree) the order for redemption must be taken to have operated as a judgment of foreclosure. The decree declared the mortgagor entitled to obtain possession of the mortgaged property on payment of a particular sum, and if he failed to discharge that debt, he cannot be allowed to harass the mortgagee by another suit for the same purpose."

A different view has however been expressed recently by the Madras High Court, for it has held that when a decree merely declared the plaintiff entitled to redeem on payment of a certain sum to the mortgagee, and did not declare that the mortgagor would be foreclosed if he did not exercise his right of redemption, the mortgagor was not debarred from bringing a subsequent suit to redeem the same property (z).

A suit to recover possession of immoveable property conveyed in trust, or mortgaged, and afterwards purchased from the trustee or mortgagee in good faith and for value is, under the present law, barred after twelve years,—the period beginning to run from the date of the purchase (a). And so is a suit to recover moveable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depository, or pawnnee, for a valuable consideration (b). And the Act of 1871 contained similar provisions (c).

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(y) *Gan Savant Bal Savant v. Narayan Dhond Savant*, I.L.R. 7 Bom. 467 (cf. p. 469).

(z) *Sami v. Somasundram*, I.L.R. 6 Mad. 119; and compare the remarks of the Full Bench in *Doobee Singh v. Jowkee Ram*, 3 N.W.P. (Agra) H.C. [1868] p. 381.

(a) Act XV of 1877, Sch. II, Art. 134.

(b) *Ibid*, Art. 133.

(c) Act IX of 1871, Sch. II, Arts. 133 and 134.

Dealing with the corresponding sections of Act XIV of 1859 (d) it has been held that one who under these provisions resists the claim of a mortgagor to redeem, must prove that he is a purchaser within the proper meaning of the term,—that he is a *bonâ fide* purchaser,—and that he is a purchaser for valuable consideration. And a *bonâ fide* purchaser is one who purchases that which is *de facto* a mortgage, or subject to a trust, upon a representation made to him, and in full belief that it is not a mortgage, or subject to a trust, but an absolute title (e). The provisions of sec. 5 of Act XIV of 1859 are of an extremely stringent kind. “They take away and cut down the title which *ex hypothesi* is a good title of the *cestui que trust*, or of a person who has deposited, pawned or mortgaged property : they cut down that title in regard to the number of years that the person would have had a right to assert it : from a very great length of time, sixty years, they cut it down to twelve years. It is therefore only proper that any person claiming the benefit of this section should clearly and distinctly shew that he fills the position of the person contemplated by this section as the person who ought to be protected” (f).

Where the rents and profits of certain mortgaged property were enjoyed exclusively for a period of fifteen years by one of the co-owners of the property, but he had not had possession of the property itself for more than twelve years, it was held that the exclusive receipt of the rents and profits for twelve years prior to the suit, though evidence of an exclusive right residing in him to redeem the property, could not with

(d) Sec. I, cl. 12, and sec 5.

(e) *Radanath Doss v. Gisborne & Co.*, 14 Moore's I. A. 1; S.C. reported as *Radanath Doss v. Scott. Elliott*, 6 B.L.R. 530.

(f) *Radhanath Doss v. Gisborne & Co.*, 14 Moore's I.A. 1 (cf. p. 15); 6 B.L.R. 530. (cf. p. 543); approved and followed in *Juggernath Sahoo v. Syud Shah Mahomed Hossein*, L.R. 2 I.A. 48; S.C. 14 B.L.R. 386. See also *Maniklal Atmaram v. Manchershî Dînsha Coachman*, I.L.R. 1 Bom. 269.

reference to sec. 28 of the Limitation Act (XV of 1877) have had the effect of determining the right of the other co-owners to redeem, and consequently did not vest him with a hostile possession of that right (g).

The manner in which redemption is carried out varies according to the nature of the mortgage. But in all cases the redemption is complete on the payment or tender to the mortgagee, or in cases to which the Bengal Regulations apply, on the deposit in Court, so long as the right of redemption is in existence, of the sum on payment of which the mortgage is by the contract declared to be redeemable (h).

A mortgage deed provided that certain lands should remain in the possession of the mortgagee, until the principal sum lent should be paid down. The mortgagee having entered on possession and collected an amount equal to the principal (without any interest), the mortgagor sued to redeem, contending that as the deed was silent on the subject of interest, the mortgagee had got all that he was entitled to. It was held that he was not in a position to redeem, and in delivering judgment, the Court said,—“ We find that the lands were by the deed to remain in possession of the mortgagee until the principal sum lent should be paid down. This, therefore, in our opinion, clearly implies that the usufruct was intended in lieu of interest, and the land redeemable on payment of the money lent. A mortgagor is under the law entitled to recover possession when the debt is satisfied, principal and legal interest, from the usufruct, or the mortgaged lands can be redeemed by deposit of the principal, and an account taken afterwards of the receipts during the mortgagee's possession. The special appellant in this case

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(g) *Chathu v. Aku*, I.L.R. 7 Mad. 26.

(h) Compare the Transfer of Property Act, 1882, sec. 60. See also sec. 62.

(the mortgagor) has not become entitled under either of these conditions" (i).

In another case a mortgage deed, by way of conditional sale of certain immoveable property for a term of seven years, fixed a certain sum as the annual interest payable, and conferred a power on the creditor to sue year by year for intermediate arrears of interest, if any occurred, during the currency of the term of the mortgage, the person and the whole estate of the debtor being liable for the payment of such claims for interest. The instrument further contained a provision that the debtor might, at the end of the term, pay the principal amount due, and the interest for the last year and take back his deed, that is, might redeem the property conditionally sold. The mortgagee obtained payment of the interest for the first four years by bringing suits against the mortgagor. The interest for the last three years, as well as the principal sum remaining unpaid, the mortgagor sued for redemption of the mortgaged property, on payment of the principal sum and the interest for the last year only, and contending that the interest of the other two years was not secured on the mortgaged property, but was, under the terms of the instrument of mortgage, realizable by suit from his non-hypothecated property and person. It was held that the mortgage was not redeemable on payment of the last year's interest only, but on payment of the interest of the other years as well (j). It was observed by *Tyrrel, J.*, (k) that the provision that redemption was obtainable by payment of the principal with the seventh year's interest thereon was based on the hypothesis that the conditions as to antecedent payments had been duly fulfilled, whether by voluntary payment made by the debtor, or under decrees obtained in that behalf against him by

(i) *Shah Baboo Bunwareelal v. Mahomed Hossein Khan*, 2 Hay 150.

(j) *Surju Prasad v. Mansur Ali Khan*, I.L.R., 5 All. 463.

(k) *Ibid.*, p. 473.

the creditor in the exercise of the special and additional powers secured to him to that effect under the deed ; and *Stuart, C.J.*, (l) took substantially the same view as to the construction of the instrument.

A mortgage deed, and a separate deed relating to the same transaction, contained stipulations for the annual payment to the mortgagor by the mortgagee, who was to have possession, of a certain sum for *nankar* and *seer*. The mortgagor sued to redeem, and stated in his plaint that he meant to bring a separate suit for arrears of the *nankar* and *seer*. It was ruled, that he was not obliged to include his claim for these arrears in the redemption suit, and that there was no such splitting of demands, as rendered him liable to a nonsuit (m). In another case it was held that the mortgagor was right in including a claim for arrears of *nankar* in a redemption suit, in which a general account was demanded (n).

A mortgagee got possession of certain lands not included in his mortgage. The mortgagor afterwards sued to redeem, not mentioning these lands. He then brought another suit for possession of them : and it was held that this was no splitting of claims, and that the cause of action was not one (o).

A mortgagee having fraudulently excluded part of the mortgaged property from the rent roll, and entered it as rent-free, the mortgagor rightly included in his redemption suit a prayer that this might be corrected, and that the mortgagee might be charged with the rent which ought not to have been relinquished (p).

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(l) *Surju Prasad v. Mansur Ali Khan*, I.L.R. 5 All. 463 (cf. pp. 473—478)

(m) *Syud Wuzeer Ulee v. Jugmohun Singh*, S.D.A. N.W.P., 1854, p. 465.

(n) *Booth v. Ramdeen*, S.D.A. N.W.P., 1854, p. 522.

(o) *Rambhujun Patuck v. Goor Suhae*, S.D.A. N.W.P., 1854, p. 425.

(p) *Bhyroo Singh v. Nuthoo Singh*, S.D.A. N.W.P., 1854, p. 525.

Under English law a suit for an account cannot ordinarily be maintained by a mortgagor unless he asks also for redemption (*q*), and the same rule has been followed by the Bombay High Court which has held that under the Dekkhan Agriculturist's Relief Act, 1879, (XVII of 1879), as it stood before it was altered by Act XXII of 1882, an agriculturist mortgagor had no right to sue his mortgagee in a mere action for account, but that he must, when asking for an account, add a prayer for redemption (*r*), and consequently that where there had been a suit for an account only, a subsequent suit for recovery of possession on payment of the money declared due, was barred under either sec. 13 or sec. 43 of the Code of Civil Procedure (*s*). The point, has, however, been provided for by Act XXII of 1882 (amending the Dekkhan Agriculturist's Relief Act, 1879), and now an agriculturist mortgagor who has sued for an account only, may subsequently at any time before the decree in the suit is signed, apply to the Court to pass a decree for the redemption of the mortgage (*t*).

When the defendant in a redemption suit denies the mortgage and sets up an absolute title, the burden of proof lies on the plaintiff. Thus, where the plaintiff sued to recover land in the possession of the defendant and of his predecessors whose title had been unchallenged for forty-five years on the ground that the estate was mortgaged only by the plaintiff's ancestors, and that the defendant was only an usufructuary mortgagee in possession, the Privy Council held that the *onus probandi* was on the plaintiff, who could only succeed by the strength of his own, and not by reason of the weakness of the defendant's

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(*q*) 2 Fisher's Law of Mortgage, 3rd Ed., p. 716.

(*r*) *Hari v Lakshman*, I.L.R. 5 Bom. 614.

(*s*) *Bhau Balaji v. Hari Nilkanthrao*, I.L.R. 7 Bom. 377.

(*t*) Act XVII of 1879, sec. 15 D as amended by Act XXII of 1882, sec. 6.

title (u) and the principle of this decision has been followed by the Courts in this country (v).

In a redemption suit, the mortgagee kept back the original mortgage deed, and produced one which turned out to be a forgery. It was held that the Court should have gone on with the case, and decided it upon secondary evidence produced by the mortgagor of what the terms of the contract were (w).

In another case the defendant admitted that he was in possession of the property in dispute as a mortgagee under the plaintiff, but refused to put in evidence the mortgage deed which was insufficiently stamped. It was held that the plaintiff was entitled to redeem, on paying what was due from him on the mortgage, together with the costs of the suit, and that as it lay upon the mortgagee to prove what was so due, he could, if he refused to put the mortgage deed in evidence, only be credited in the account with the sum which the plaintiff admitted to be the amount of the principal, and must be debited with the income derived from the land since he (the mortgagee) had been in possession, for which he must account (x).

When in a redemption suit the mortgagee alleged that the mortgage had been foreclosed, but that the foreclosure decree had been accidentally destroyed by fire and tendered as evidence that such a decree had been passed a reference to a copy of the decree contained in a judgment in another suit, and a statement by a third party (who was dead when the redemption suit was brought) that the mortgage had

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(u) *Sevvaji Vijaya Raghunadha Valogi Kristnan Gopalar v. Chinna Nayana Chetti*, 10 Moore's I. A. 151.

(v) *Rughoonath Rai v. Chundoo Lal*, 2 N. W. P. (Agra) H. C. [1867] 395; *Ratan Kuar v. Jiwan Singh*, I.L.R. 1 All. 194; *Balaji Narji v. Babu Devli*, 5 Bom. H. C. (a.c.j.) 159.

(w) *Booaram Tewaree v. Beharee Loll*, S.D.A. N.W.P., 1855, p. 69.

(x) *Ganga Mulik v. Bayaji*, I.L.R. 6 Bom. 669.



been foreclosed, it was held by the Court that there was no legal evidence that the mortgage had been foreclosed and that under the circumstances the plaintiff was entitled to redeem on payment of the principal amount of the mortgage. A written statement of the contents of a copy of a document, the original of which the person making the statement has not seen, could not be accepted as an equivalent of that which sec. 63 of the Evidence Act renders admissible, namely, an oral account of the contents of a document given by some person who has himself seen it, while there was no rule of evidence, under which the statement of the third party, which was put in by the plaintiff, as containing an admission of the mortgage, could be made use of to establish the foreclosure (y).

In one case it was urged as a defence to a suit by the purchaser of the equity of redemption against the original mortgagor and the mortgagee for possession by redemption of the mortgaged property, that the mortgage had already been redeemed by the original mortgagor, and the suit was therefore not maintainable, but it was held, that, assuming that such redemption had taken place, that fact could not prejudice the plaintiff's rights arising out of the mortgage, whatever the effect of such redemption might be as between the original mortgagor and the mortgagee (z).

Where the brother of a mortgagee who was made a defendant in a redemption suit on the ground that he was in possession of the mortgaged property on account of the mortgagee, disclaimed all interest in the land on his own account, and admitted that he only held possession on behalf of the mortgagee, it was held that it was not open to him to appeal in his own name and on his own account against a decree which decided in favour of plaintiff's title and against the mortgagee (a).

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(y) *Kanayalal v. Pyarabai*, I.L.R. 7 Bom. 139.

(z) *Jaijit Rai v. Gobind Tiwari*, I.L.R. 6 All. 303.

(a) *Sesha v. Pappuvarada*, I.L.R. 6 Mad. 185.

The tender or deposit must be of money, and the lender is not bound to accept of a *teep*, bond, or bill, instead of cash. However, if he does accept such a mode of payment, he cannot afterwards repudiate his acceptance.

But a strict compliance with the terms of his agreement, is all that is required of the mortgagor (b). Therefore, a tender or deposit not made in cash, is good, if it was the intention of the parties, at the time of contracting, that a payment or tender so made should be sufficient. Where it appeared to be in accordance with the original intention of the parties, certain sums due from the mortgagee were allowed to be deducted by the mortgagor from his debt, and a tender of Company's paper, the nominal value of which amounted to the debt so reduced, was held a sufficient tender, without reference to the selling price of the paper,—the mortgagors having shown to the satisfaction of the Court, that they offered to pay all that was justly due at the date of making the tender, and in the mode contemplated by the lender (c).

So, when the mortgage deed stipulates that the mortgagor shall be entitled to redeem on paying the principal, a tender of the principal alone is sufficient: and any claim which the mortgagee may have for interest, or for other matters arising out of the mortgage transaction, must be enforced by him in a separate suit against the mortgagor: nor can the mortgagee, on the ground of any such claim, oppose the mortgagor's right of redemption (d).

Lands were mortgaged as being *lakhiraj*, and the mortgagee was put in possession, the agreement being that the

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(b) *Muhesha Seth v. Sheogobind*, S.D.A. N.W.P., 1856, p. 147; *Durya v. Mohur Singh*, 2 N. W. P. (Agra) H. C. 163.

(c) *Lyons v. Skinner*, S.D.A. N.W.P., 1853, p. 447.

(d) *Rama Singh v. Munnoolal*, S.D.A. N.W.P., 1853, p. 441. See also *Brindabunchunder Sircar Chowdree v. Roberts*, S.D.A., 1859, p. 144.

profits should be taken in lieu of interest. Subsequently the lands were resumed, and revenue was assessed upon them. The mortgagee in possession paid certain sums on account of revenue. The mortgagor sued to redeem, depositing in Court only the principal sum borrowed by him. It was held that the deposit was sufficient to save his right to redeem, but that he was not entitled to recover possession of the land until he had also paid into Court the amount which the mortgagee had paid for revenue, with interest (e). In another case, however, it was held under similar circumstances, that the mortgagee had a lien on the land for the sums paid by him for revenue, and that the mortgagor was not entitled to redeem on tender of merely the principal monies due on the mortgage (f).

If a good and sufficient tender is made, but is rejected by the mortgagee, he is not entitled to any interest after the date of the tender,—and if he is in possession of the land, he is accountable for the proceeds from that date, such proceeds being estimated according to the gross *jumma bundee*. All his rights under the mortgage contract are in fact at an end, on a proper tender being made (g).

Under Act VIII of 1859 if the suit be for land situate within the limits of a single district, but within the jurisdiction of different Courts, the suit may be brought in a Court within whose jurisdiction any part of the land lies, if the claim in respect of the value of the land, be cognizable by the Court: but the Court in which the suit is brought must apply to the District Court for authority

(e) *Joyprokash Roy v. Oorjham Jha*, 3 W. R. 174.

(f) *Nurjoon Sahoo v. Shah Moozeeroodeen*, 3 W. R. 6. See also *Doolar Chunder v. Damoodur Narain*, 3 W. R. 162.

(g) *Mussumat Asima Beebee v. Sheikh Ahmudee*, S.D.A. N.W.P., 1854, p. 1; and compare the Transfer of Property Act, 1882, s. 84.

to proceed with the same. If the property lie in different districts, the suit may be brought in any Court otherwise competent to try it, within the jurisdiction of which any portion of the land is situate, but in such case the Court in which the suit is brought must apply to the High Court for authority to proceed with the same; and if the application is made by a Court subordinate to a District Court, it must be submitted through that District Court (*h*). If the property lie in districts subject to different High Courts, the application is to be made to the High Court to which the district in which the suit is brought is subject, and such High Court, with the concurrence of the High Court to which the other district is subject, may give authority to proceed with the same (*i*).

Under Acts X of 1877 and XIV of 1882, which had operation from the 1st of October 1877 and the 1st of June 1882 respectively, suits for the redemption of a mortgage of immoveable property, or for the determination of any other right to or interest in immoveable property, must be instituted in the Court within the local limits of whose jurisdiction the property is situate. If the property be situate within the limits of a single district, but within the jurisdiction of different Courts, the suit may be instituted in the Court within whose jurisdiction any portion of the property is situate,—provided that, in respect of value, the entire claim be cognizable by such Court. If the immoveable property be situate within the limits of different districts, the suit may be instituted in any Court otherwise competent to try it within whose jurisdiction any portion of the property is situate (*j*).

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(*h*) Act VIII of 1859, secs. 11 and 12.

(*i*) *Ibid*, sec. 13, and see sec. 14.

(*j*) Act X of 1877 and Act XIV of 1882, secs. 16 and 19: and see the other sections of chap. 2 of those Acts, as to the *place of suing*. —

Where certain lands situated in the British district of Mirzapur were included in the same mortgage with other lands lying within the domains of the Maharaja of Benares and the mortgagors sued in the Mirzapur Court for redemption of the lands situated in the Mirzapur district only, it was held that the Mirzapur Court might take an account of the sums realized by the mortgagee from all the lands mortgaged, including those within the domains of the Maharaja, for the purpose of deciding whether the entire mortgage debt had been satisfied, and might, having found that this was the case, give the plaintiff a decree for the redemption of the lands lying within the local limits of its jurisdiction, notwithstanding that in the suit it would have incidentally to determine questions relating to lands lying within the domains of the Maharaja (*k*).

Section 7, cl. IX of Act VII of 1870 (the Court Fees' Act, 1870) declares that in suits against a mortgagee for the recovery of the property mortgaged the amount of fee payable under the Act shall be computed according to the principal money expressed to be secured by the instrument of mortgage. It has been held by a majority of a Full Bench of the High Court at Madras that this valuation of a redemption suit for the purposes of the Court fees should be adopted also for the purposes of jurisdiction under the Madras Civil Courts Act (Mad. Act III of 1873), and therefore that, as the Court Fees' Act only takes into consideration "the principal amount expressed to be secured by the instrument of mortgage," and as by the custom of Malabar the amount spent on improvements made by the mortgagee is not secured by a *Kanam* mortgage, though the mortgagor cannot redeem the mortgage without paying for such improvements, the amount so spent cannot be calculated in ascertaining the value of the subject-matter of the suit for the purpose of jurisdiction under s. 12 of the Madras Civil Courts Act.

The two other learned Judges forming the Full Bench (Turner, C.J., and *Muttusami Ayyar*, J.,) were however of opinion, that the repayment of the sums spent in improvements was secured in the case of a *Kanam* mortgage in the same manner as the payment of the principal advanced, and therefore must be calculated in determining the value of the subject-matter of the suit for the purposes of jurisdiction (l).

It has been held by the Allahabad Court that when the suit for redemption has been brought by the purchaser of the equity of redemption, and the mortgagor has been made a *pro forma* defendant, the suit should still be valued at the amount of the mortgage money (m).

It has been ruled by the Bombay High Court that in a redemption suit the defendant (mortgagee) is ordinarily entitled to his costs, unless he has refused a tender of the amount due to him, or has so misconducted himself in the course of the suit as to induce the Court to subject him to a penalty (n).

I. As to the redemption of pure usufructuary mortgages (o).

*When the mortgage contract was entered into previous to the passing of Act XXVIII of 1855.*

The general custom in former times seems to have been that the usufruct of the mortgaged property, however lucrative it might be, should be taken in lieu of interest, and that there should be no redemption until payment or tender of the principal in full (p). Since the 28th of March 1780,

(l) *Zamorin of Calicut v. Narayana*, I.L.R. 5 Mad. 284 (F.B.).

(m) *Kubair Singh v. Atma Ram* I.L.R., 5 All. 332.

(n) *Dhondò Ramchandra v. Balkrishna Govind Nagvekar*, I.L.R. 8 Bom. 190 (cf. p. 193); and compare the Transfer of Property Act, 1882, sec. 94.

(o) Compare the Transfer of Property Act, 1882, sec. 62, for the right of an usufructuary mortgagor to recover possession.

(p) See Ben. Reg. XV, 1793, sec. 10.

however, the usufructuary mortgagee in Bengal (*q*) is confined to interest at twelve per cent. per annum, or at any lower rate which may have been agreed upon, and whatever sums are received from the land in excess of such interest, are applied to the reduction of the principal.

By Bengal Regulation XV of 1793, sec. 10, it is enacted:—"In cases of mortgages of real property, executed prior to the twenty-eighth day of March one thousand seven hundred and eighty, in which the mortgagee may have had the usufruct of the mortgaged property, whether he shall have held it in his own possession or not, the usufruct is to be allowed to the mortgagee, in lieu of interest, agreeably to the former custom of the country (provided it shall have been so stipulated between the parties), until the abovementioned date, subsequent to which, the same interest is to be allowed on such mortgage bonds, and also on all bonds for the mortgage of real property, which have been entered into on or since that date, or that may be hereafter executed, as is allowed on other bonds which have been or may be granted on or posterior to such date, and no more; and all such mortgages are to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum with the simple interest due upon it shall have been realized from the usufruct of the mortgaged property subsequent to the twenty-eighth day of March one thousand seven hundred and eighty, or otherwise liquidated by the mortgagor" (*r*).

All such mortgages are, therefore, to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum with the simple interest due upon it, at any rate agreed upon not exceeding twelve per cent. per annum,

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(*q*) For the law in other provinces see *supra* p. 149 (*note*).

(*r*) Ben. Reg. XV, 1793, sec. 10; Ben. Reg. XVII, 1806, sec. 5; Ben. Reg. XXXIV, 1803, sec. 9. All of these are repealed by Act XXVIII of 1855, *as to contracts entered into since the passing of that Act*.



shall have been realized from the usufruct of the property or otherwise.

In a suit (s) to redeem an usufructuary mortgage, the principal deed contained an agreement to pay interest at the rate of nine per cent. per annum. But there were two other transactions (the whole three forming one mortgage) by which the result was to secure to the mortgagee interest at a rate considerably above twelve per cent. There was much discussion as to the rate of interest which the Courts ought to allow, and as to whether secs. 8 and 9 (the penal sections) of Ben. Regulation XV of 1793 were applicable. The Sudder Court held that the only rate "stipulated" for was the nine per cent. expressed in the principal deed, and that therefore they were bound by sec. 5 of the Regulation to give interest at that rate only. The Privy Council held that as the suit was by the mortgagor for redemption (and not by the mortgagee seeking to enforce his usurious contract) the penal secs. 8 and 9 did not apply: that although nine per cent. was the only rate expressed, it was not the rate really "stipulated" between the parties,—and that the usurious rate stated by the mortgagor and proved, was the real rate "stipulated between the parties:" and therefore that the Court was not bound to award only nine per cent., but should under the circumstances have awarded twelve per cent. Referring to sec. 10 of Ben. Reg. XV of 1793 their Lordships say: "At the time when this Regulation was passed, the receipt of profits in lieu of interest under a simple usufruct mortgage was common, as indeed appears by the introductory words of the clause. As to mortgages executed before the 28th of March 1780, the usufruct might be allowed, even after the Regulation, in lieu of interest up to that date. Then, after that date, that

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(s) *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 12 Moore's I. A. 157; S.C. 2 B.L.R. (P.C.) 44.

dividing point of time, and subsequently to it, the character of these mortgages suffered a change. The mortgage possession, instead of enduring by title for the stipulated time, was made liable to abridgment by satisfaction from the usufruct, and a claim to interest arose in some cases where it did not exist before. The perception of the profits in many cases did not constitute receipt of interest, but was in lieu of any. Then, as to all usufructuary mortgages to be made after the dividing time which was before the Regulation, it makes also provision, and subjects alike all the enumerated mortgages, to cancellation and redemption whenever the principal sum, 'with the simple interest due upon it,' shall have been realized from the usufruct of the property subsequent to the 28th day of March 1780, or otherwise liquidated by the mortgagor. It applies then, to all alike, though the circumstances of them all were not originally similar,—subjects them to one provision, and imposes interest in some cases where there was no contract for it before. This section, having so provided, drops designedly the words 'stipulated' and 'specified' which would have been inappropriate in many of the cases, and uses, in more correct language, this expression: 'the simple interest due upon it.' This simple interest would of course, in all cases where no interest was named, be twelve per cent.; but where a higher rate was named, against which the usufruct was to be a set-off,—that is, a receipt 'in lieu' of it,—the reduced rate would be twelve per cent., and all interest alike would be 'due' by force of the enactment, even where interest did not exist before; therefore, as this is the case of an usufructuary mortgage, by means of which a profit higher than the return of twelve per cent. was to be made, and as relief is sought, *viz.*, to have the pledge restored as cancelled or redeemed by satisfaction of the usufruct, the clause which is most closely applicable to the claim is the 10th section, the

terms of which are large enough to embrace, and were designed, in fact, to embrace, some cases where the law itself made the interest 'due.' The Regulation, then, rather seems to favour than prohibit the restoration of the pledge on the Court terms, that is, on reduced terms of interest imposed by the law. The real transaction appearing, and no prohibitory law intervening, the Court is left free to do justice in the particular case, and if the spirit of the 10th section regulate the case, it will sanction a redemption at the higher rate, allowing the actual contract so far as the law allows it" (t).

The same rule applies to zur-i-peshgee leases, which, as has been seen already, are considered to be of the nature of pure usufructuary mortgages, and are therefore subject to the rules which govern them (u). In one case, in which the mortgagee held on after the end of his lease, his debt not being fully paid off, the Court decided that the mortgagor in order to entitle him to possession, must proceed regularly after the whole amount of the debt had been realised from the property,—and that this would be so, whether the original term of the lease had expired or not (v).

All proceedings under Ben. Reg. XV of 1793, section 10, must be taken by way of regular suit, and there is

(t) *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 12 Moore's L. A. 157 (cf. p. 190); S.C. 2 B.L.R. (P.C.) 44. (cf. p. 52).

(u) *Supra* p. 12. See also *Shamnarain v. Hurbuns Roy*, S.D.A. 1859, p. 1566; *Baboo Ishwur Dutt Singh v. Baboo Raj Koomar Singh*, S.D.A. 1860, vol. 2, p. 174; *Anundgopal Sohay v. Gopal Dass*, S.D.A. 1862, vol. 1, p. 57; *Kishito Coomer Singh v. Chowdree Beeraj Singh*, 2 Hay 159; *Mussamut Motee Soonderée v. Maharaneé Indrajit Kowaree*, Marsh. p. 112; *Brijololl Upadhya v. Motee Soonderée*, W.R. Sp. 33; *Nurjoon Sahoo, v. Shah Moozeerooddeen*, 3 W.R. 6; *Doolar Chunder v. Damoodur Narain*, 3 W.R. 162; *Joyprokash Roy v. Oorjhan Jha*, 3 W.R. 174.

(v) *Raj Coomar Sing v. Munnoolal*, S.D.A., 1860, vol. 1, p. 364.

no provision for disposing summarily of cases which fall within its scope (*w*). The only point to be determined in such suits is, whether the mortgage debt has been satisfied in full. In *Nawab Azimut Ali Khan v. Jowahir Sing* (*x*) the Privy Council said: "According to the course and practice of the Courts in India, the only point to be determined in such a suit is whether the mortgage debt has been fully satisfied after taking into account the sum tendered or deposited: nor is the finding of any particular amount as still due conclusive against the mortgagee in a subsequent suit." This rule however—which certainly operates harshly and has a tendency to expose the parties to needless litigation and expense—has scarcely been followed by the Courts here in some of the more recent cases. Thus in 1872 the late Chief Justice (*y*) said,—“The suit is in reality, in our opinion, a suit between the mortgagor and the mortgagee for an adjustment of the account between them. If upon taking the account it appears that the mortgagee has been fully satisfied, the plaintiff, the mortgagor, is entitled to have back the property, and the Court would make a decree for that purpose; but we think that the question in the suit is not simply whether the plaintiff is entitled to have the property back, and that, the Court being a Court of equity and acting upon the principle that it is always the aim of a Court of equity to fully determine as far as possible all questions concerning the subject of the suit,

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(*w*) Cons. 277. 9th July 1817; Cons. 830 W. C., 20th Sept. Calc. C., 18th Oct. 1833. See also *Shah Golam Nuzuff v. Mussumut Enamun*, S.D.A. 1860, vol. 1, p 383; *Shamnaraïn v. Soobram*, S.D.A. 1860, vol. 1, p. 390.

(*x*) 13 Moore's I.A. 404 (*cf.* p. 412) decided in June 1870. See also *Mussamut Motee Soonderee v. Maharanee Indrajit Kowaree*, Marsh., 112; *Brijololl Upadhya v. Motee Soonderee*, W. R. Sp. 33, dissented from in *Baboo Kullyan Dass v. Baboo Sheo Nundun Purshad Singh*, 18 W.R. 65.

(*y*) Sir Richard Couch.

the account should be taken up to the time of the decree, and the account so taken should be considered to be binding, and the parties should not be at liberty, except under peculiar circumstances, to reopen it in another suit. Therefore, in the present case, we think we must deal with the suit as one for the adjustment of the account to be followed by a decree according to what shall appear, on taking the account, to be the right either of the plaintiff or the defendant" (z).

It has been held that nothing can ever deprive the mortgagor of his right to have the accounts of the mortgagee in possession taken, not even an admission in his plaint that some thing may possibly still be due on the mortgage (a). And the mortgagor is not bound to prove, in the first instance and independently of the taking of the accounts, that the mortgage debt has been paid off (b): but if he fails eventually to prove that it has been satisfied, his suit will be dismissed with costs (c): and the *onus* is on him to prove that the mortgagee in possession has been paid in full by perception of the profits (d).

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(z) *Baboo Kullyan Dass v. Baboo Sheo Nundum Purshad Singh*, 18 W.R. 65. See also *Roy Dinkur Doyal v. Sheo Golam Singh*, 22 W.R. 172; *Shah Lutafut Hossein v. Chowdhry Mahomed Moonem*, 22 W.R. 269; *Rajah Saheb Perladh Singh Bahadoor v. Broughton*, 24 W.R. 225. In none of these cases was the decision of the Privy Council in the case of *Nawab Azimut Ali Khan v. Jowahir Sing*, 13 Moore's I.A. 404 referred to.

(a) *Chowbey Hurbuns Rae v. Chowdhree Petum Sing*, S.D.A. N.W.P., 1854, p. 371; *Meglal Singh v. Hurnath Singh*, S.D.A., 1858, p. 1691; *Baboo Bunseedhur Singh v. Baboo Nundolall Singh*, S.D.A., 1859, p. 1076. But see in the case of an usufructuary conditional sale *Forbes v. Ameeroonissa Begum*, 10 Moore's I.A. 340; S.C. 5 W.R. (P.C.) 47.

(b) *Jadoobungsee Sahoy v. Moheeput Singh*, S.D.A., 1855, p. 432; *Tooree Beebee v. Nuzzer Mahomed*, S.D.A., 1859, p. 5.

(c) *Nekram v. Chynsoolkh*, S.D.A., N.W.P., 1856, p. 3.

(d) *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 12 Moore's I. A. 157; S.C. 2 B.L.R. (P.C.) 44.

A condition in a mortgage deed that the mortgagor shall not claim an account from the mortgagee who has been in possession, does not in any degree bar the operation of the law by which the lender is to account to the borrower for the proceeds during his possession (e). As a general rule, the mortgagee may be called on by the mortgagor to account at any time, on the mortgagor's allegation that the whole sum due, with interest, has been received by him. And it has been held, that the mere fact that the term mentioned as that during which a *zur-i-peshgee* lease is to continue in force, has not yet elapsed,—or even a special agreement that the mortgagee shall remain in possession until payment of the debt is made in one sum,—does not prevent the mortgage from being at an end whenever the mortgagee has received both principal and interest (f).

In a recent case the facts were, that by the terms of the mortgage it was provided that the annual profits of the mortgaged property should be taken to be a certain amount, that out of this amount the revenue should be paid annually by the mortgagee; that the balance should be taken by the mortgagee as representing interest on the principal amount of the mortgage money, and that the mortgage should be redeemed on payment of the principal of the

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(e) *Punjum Singh v. Musst. Ameena Khatoon*, 6 W.R. 6; *Sheikh Bukshoo v. Bheekaree Khan*, S.D.A., 1851, p. 632; *Baboo Bunseedhur Singh v. Baboo Nundolall Singh*, S.D.A., 1859, p. 1076; *Khyaleeram v. Ramdyal*, S.D.A., N.W.P., 1855, p. 51; *Sudasookh Lol v. Sumbhounath*, S.D.A., N.W.P., 1855, p. 198. See also *supra* p. 156.

(f) *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 12 Moore's I. A. 157; *Punjum Singh v. Musst. Ameena Khatoon*, 6 W. R. 6; *Doobah Singh v. Gouree Dutt*, S.D.A., 1852, p. 280; *Petition No. 339 of 1851*, S.D.A., 1852, p. 304; *Anundgopal Sohay v. Gopal Dass*, S.D.A., 1862, vol. 1, p. 57; *Baboo Dul Bukadur Sahai v. Baboo Bhugwan Dutt Tewaree*, S.D.A. N.W.P., 1850, p. 266.

mortgage-money in a lump sum. It was further provided that the mortgagor should not be entitled to claim mesne profits nor the mortgagee to claim interest. A purchaser of the equity of redemption, alleging that since his purchase the mortgagee had not paid any revenue and therefore he, the purchaser, had been compelled to pay it, and that consequently the mortgage-money had been paid out of the profits of the mortgaged property and a surplus was due, sued the original mortgagor and the mortgagee for possession by redemption of the mortgaged property, and for surplus profits, or for possession of the mortgaged property on payment of any sum which might be found due. It was held by the Allahabad High Court, following the decisions last referred to, that the plaintiff was entitled to sue for possession of the land by redemption of the mortgage. It was also held that as it was clear that the mortgagee had full notice of the acquisition of the mortgagor's rights by the plaintiff, and it was not denied that the plaintiff had to pay to Government the annual revenue of the mortgaged land, the plaintiff was entitled in equity, while suing for redemption, to take into account the amount of the revenue, which, by reason of the mortgagee's default, he had to pay to Government for the mortgaged land and to calculate it against the principal sum due on the mortgage; and further that, as the mortgagee had had notice of the plaintiff's purchase, any payments, which he might have made to the original mortgagor on account of revenue after the purchase, were improperly made, and could not be taken into account against the plaintiff (g).

But in the case of a *zur-i-peshgee* lease or other mortgage made after the passing of Act XXVIII of 1855, all depends upon the terms of the contract. And if it is clearly the intention that the mortgagee shall under all circumstances

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(g) *Jaijit Rai v. Gobind Tiwari*, I. L. R. 6 All. 303.



have possession up to a fixed date, the mortgagor cannot redeem prior to that date (*h*).

The mortgagor must be careful not to oust the mortgagee within the period during which he is entitled to remain in possession, unless he is prepared to show, beyond doubt, that the debt has been fully paid off. If he does oust the mortgagee too soon, he renders himself personally liable to an action for the balance then due, the mortgagee being no longer restricted to his claim for possession (*i*).

A mortgagee was in possession, the contract being that out of the usufruct he should keep a certain sum by way of interest, and that, if the usufruct was insufficient, the mortgagor would make up the deficiency in the interest. The mortgagor tendered the principal, and took possession, forcibly ejecting the mortgagee. The latter thereupon brought a regular suit to recover possession. It was held that the principal having been tendered to the mortgagee, the *onus* lay upon him to produce his accounts and prove that something still remained due to him for interest (*j*).

A mortgagee to whom the usufruct was given in lieu of interest, was in possession. A purchaser of the mortgagor's right of redemption sued to redeem, offering to bring the principal into Court, which the Court wrongly refused to allow him to do. It was held that it was not necessary to prove that the mortgage debt had been tendered to the

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(*h*) See *Chandra Kumar Banerjee v. Iswar Chandra Newgi*, 6 B. L. R. 562, and the cases there referred to. See also *Sreemunt Dutt v. Krishna Nath Roy*, 25 W. R. 10; *B. Dorappa v. Kundukuri Mallikarjunudu*, 3 Mad. H. C. 363; *Mashook Ameen Suzzada v. Marem Reddy*, 8 Mad. H. C. 31; *Syud Tuffuzool Hossein v. Sheikh Kamaul Ally*, S.D.A., 1860, vol. 2, p. 208; *Sri Raja Setrucherla Ramabhadra Raja Bahadur v. Sri Raja Vairicherla Surianarayananaraju Bahadur*, I. L. R. 2 Mad. 314; and *supra*, pp. 336-337.

(*i*) *Anandmaye Dassea v. Ranee Jadoomonee*, S.D.A., 1853, p. 59.

(*j*) *Sreemutty Pran Kishoree v. Chundee Churn Biswas*, 19 W. R. 429.

mortgagee out of Court, and that the question whether the purchaser had or had not tendered the money to the mortgagee before he sued, was one which only affected the right of the purchaser to recover his costs. If the purchaser proved that he had offered the money to the mortgagee out of Court, he would be entitled to recover the property and to get his costs of suit, as well as the proceeds recovered by the mortgagee in excess of the interest at twelve per cent. and the costs of collection; and if the purchaser failed to prove the previous tender, he would still be entitled to recover possession, on depositing the money within a certain time to be named in the decree,—but that in the latter case he would not get any costs of suit (k).

The purchaser of a mortgagor's interest, with full notice of the mortgage, ousted the mortgagee in possession, denying that there ever was a mortgage. It was held that being a wrong-doer in ousting the mortgagee, he could not insist on the mortgagee rendering his accounts under sec. 2 of Ben. Reg. XV of 1793: that he would be personally liable in a suit for damages for ousting the mortgagee, but that he was not *personally* liable for the mortgage debt merely as representing the mortgagor in the lands pledged (l).

In one case the mortgage, which had been entered into in 1854, provided that the mortgagee should take all the profits in lieu of interest, and that the mortgage should be redeemable on payment by the mortgagor of the principal money. In 1880 the mortgagor sued, with reference to Ben. Reg. XV of 1793, for possession of the land, on the ground that the mortgage had been redeemed, as the principal money and interest at twelve per cent. had been received out of the profits, and claimed an account. The mortgagee set

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(k) *Dinonath Butobyal v. Womachurn Roy*, 3 W. R. 128.

(l) *Chutterdharee Koowar v. Ramdoolaree Koowur*, S.D.A., 1859, p. 1181.

up as a defence that the provisions of that Regulation were not applicable, as after its repeal by Act XXVIII of 1855 the mortgagor had agreed not to claim an account. This agreement he alleged was contained in the following words in the *wajib-ul-arz* or administration paper recorded for 1871, namely: "The mortgage (that is the mortgage of 1854 referred to) is for three years, with this declaration as to mortgage that the entire profits of the mortgaged property have been assigned in lieu of interest on the mortgage-money, so that up to the term of mortgage, I, the mortgagor, shall have no claim to profits nor the mortgagee to interest." It was held however by the Court (*Stuart, C.J.*, and *Tyrrell, J.*) that on a correct construction of the whole document the *wajib-ul-arz* did not contain a new contract or ratification of the old contract of 1854, but merely a recital of the mortgage as still existing and operative. The provisions of the law in force when the mortgage was made, *viz.*, Ben. Reg. XV of 1793, must therefore be looked to, and as the validity of the contract under that law, under which the mortgagee might only retain his pledge until he had received out of it his debt with interest at twelve per cent., could not be ascertained without an account being taken, the plaintiff was entitled to an account (*m*).

It was suggested on behalf of the mortgagor in the same case that under 13 Geo. III, cap. 63, sec. 30, the mortgage in question was absolutely null and void and could not therefore be the foundation of any suit, but it was held by *Stuart, C.J.*, that, though this would no doubt have been so if the parties to the contract had been British subjects of the English Crown, the parties to the present contract, being natives of India, were at the time when

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(*m*) *Mahiab Kuar v. The Collector of Shahjahanpur*, I. L. R. 5 All. 419.

that Statute was passed in 1773, only such subjects in an indirect and modified sense, and therefore that the Statute did not apply (*n*).

It has been held by the Madras High Court that though sec. 8 of Mad. Reg. XXXIV of 1802, corresponding with sec. 10 of Ben. Reg. XV of 1793, still applies to usufructuary mortgages executed before the passing of Act XXVIII of 1855, it does not apply in the case of an *Iladarawara* mortgage (*o*) in South Canara which, securing to the mortgagee the use and occupation of the land for a long term, amounts to a lease of the property for the term agreed upon (*p*). But regard must be had in every case to the language of the instrument. So where an instrument of mortgage provided that the mortgaged land should be made over to the mortgagee for cultivation, that a grain rent, estimated at a certain quantity, should be retained yearly in lieu of interest by the mortgagee, and that on the expiry of any year the mortgage might be redeemed and possession recovered on payment of the principal, the Court distinguished the instrument from that which was the subject of the case last referred to and held that the instrument fell within the purview of the Regulation (*q*).

*When the mortgage contract has been entered into subsequent to the passing of Act XXVIII of 1855.*

The repeal of the usury laws created a great change in the position of usufructuary mortgages; and agreements made since it took place can be strictly enforced even although such as to give interest to the mortgagee at a higher rate than twelve per cent. per annum. For a mortgage

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(*n*) *Mahtab Kuar v. The Collector of Shahjahanpur*, I. L. R. 5 All. 419 (per *Stuart*, C. J., *cf.* p. 426.)

(*o*) As to the nature of this mortgage see *supra*, p. 23.

(*p*) *Perlathail Subba Rau v. Mankudé Narayana*, I. L. R. 4 Mad. 113.

(*q*) *Tippayya v. Venkata*, I. L. R. 6 Mad. 74.

or other contract for the loan of money, whereby it is agreed that the use or usufruct of any property shall be allowed in lieu of interest, is binding upon the parties (r).

Whenever a deposit may be made of the principal sum and interest due upon any mortgage or conditional sale of land, the amount of interest to be deposited shall be at the rate stipulated in the contract, or if no rate has been stipulated, and interest be payable under the terms of the contract, at the rate of twelve per cent. per annum; provided, that in the latter case the amount deposited shall be subject to the decision of the Court as to the rate at which interest shall be calculated (s). And in any case in which an adjustment of accounts may become necessary between the lender and the borrower of money upon any mortgage or conditional sale of landed property, or other contract whatsoever, entered into after the passing of the Act, *interest is to be calculated at the rate stipulated therein* (t). If no rate of interest shall have been stipulated, and interest be payable under the terms of the contract, it shall be calculated at such rate as the Court shall deem reasonable (u).

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(r) Act XXVIII of 1855, sec. 4.

(s) *Ibid*, sec. 5.

(t) *Ibid*, sec. 6.

(u) So far as they affect contracts entered into since the passing of Act XXVIII of 1855, the following sections are repealed. Ben. Reg. XV of 1793, secs. 4, 6, 7, 8, 9, 10, 11; Ben. Reg. XXXIV of 1803, secs. 3, 5, 6, 7, 8, 9, 10; Ben. Reg. VIII of 1805, sec. 23, cl. 1, so far as it extends the application of the abovementioned sections of Ben. Reg. XXXIV of 1803; Ben. Reg. XIV of 1805, sec. 9, cls. 3, 4, 5, 6, and so much of sec. 11 as bears on the subject of usury; and Ben. Reg. XVII of 1806, sec. 2, so far as it bears on the subject, and secs. 4 and 6. Mad. Reg. XXXIV of 1802, secs. 2, 4, 5 and 6, and sec. 8, so far as it bears on the subject; Mad. Reg. IV of 1816; sec. 22; Mad. Reg. V of 1816, sec. 14, Mad. Reg. VI of 1816, sec. 15; Mad. Reg. VII of 1816, sec. 13; and Mad. Reg. II of 1825, sec. 7, so much as it bears on the subject: and Bom. Reg. V of 1827, secs. 10, 11 and 12.

The effect of the change is simply to bind parties strictly by the terms of the contract they have made. When the agreement is that the usufruct is to be taken in lieu of interest, the mortgagee will not be liable to account, however large his receipts may be; he will be entitled to continue in possession until the principal is paid to him (v). If there is no mention of interest at all, it will be for the Court to say whether any is to be allowed, and at what rate. If any rate is mentioned, it will be calculated at that rate whatever it may be. In the two latter cases the mortgagee will be liable to account, but he will have to account only on the strict terms of his agreement.

II. As to the redemption of *simple* mortgages.

The Regulations lay down no particular rule as to the redemption of simple mortgages. In such cases, the mortgagor has merely to tender the whole balance due to the mortgagee for principal and interest, and may then require the mortgage deed to be delivered up. He must take care to provide himself with the means of proving his having made the tender: and if the tender is sufficient but is not accepted, he may bring a suit to have the mortgage deed cancelled, he offering to pay whatever is really due. A deed of mortgage is in fact of no effect after a tender has been made, and all its conditions and stipulations cease from that date: and therefore, when a proper tender has been made and rejected, the mortgagee ought not to be allowed any interest after the date on which it was made, and the costs of the redemption suit consequent on such rejection should be thrown on him (w).

Simple mortgages where the mortgagee has been in possession, are redeemable in like manner as are pure usufructuary mortgages; and the mortgagor is not entitled to the summary

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(v) *Munnoo Lal v. Baboo Reet Bhoobun Singh*, 6 W. R. 283.

(w) *Mussumat Asima Beebee v. Sheikh Ahmudee*, S. D. A., N. W. P. 1854, p. 1; and compare the Transfer of Property Act, 1882, sec. 84.

procedure provided by sec. 2, Ben. Reg. I, 1798, which refers to mortgages by conditional sale only (*x*). As in pure usufructuary mortgages, the liabilities and position of the parties will depend very much on the question whether the contract was entered into before, or after the passing of Act XXVIII of 1855.

But a simple mortgage, whether usufructuary or not, can only be redeemed previous to the mortgagee's bringing a suit for his money and having the property sold under a decree in satisfaction of his claim. On the land being so sold, the mortgage is of course at an end, and there can no longer be any redemption (*y*).

III. As to the redemption of mortgages by *conditional sale*, *bye-bil-wufa*, or *kut-kubala*.

The Bengal Regulations contain special provisions for the redemption of these mortgages. Under them when the mortgagee has not had possession of the land, the mortgagor may redeem by tendering to the mortgagee, or depositing in Court, the principal sum lent with the stipulated interest thereon, (not exceeding the rate of twelve per cent. per annum, if the contract was entered into before Act XXVIII of 1855 came into force) or, if interest be payable, and no rate has been stipulated for, with interest at the rate of twelve per cent.: or by tendering or depositing any less sum which is the total amount due for principal and interest. But if such smaller sum only is deposited, the mortgage will not be considered as redeemed, until it is admitted or established that the deposit covers the full amount due to the mortgagee (*z*). By Ben. Reg. I of 1798 the mortgagor has the means

(*x*) *Shah Golam Nuzuff v. Mussumut Emamun*, S. D. A., 1860, vol. 1, p. 383. See also *Shamnaraïn v. Soobram*, S. D. A., 1860, vol. 1, p. 390.

(*y*) Compare the Transfer of Property Act, 1882, p. 60 proviso.

(*z*) Ben. Reg. I, 1798, sec. 2; Ben. Reg. XXXIV, 1803, sec. 12; Act XXVIII of 1855, sec. 5.



of avoiding any dispute as to tender, and of keeping alive the right of redemption, by a payment into Court (a).

The deposit must be made in the Civil Court of the district in which the land is situated: and the Judge receiving the same will furnish the party who pays it in with a written receipt for the amount, specifying the date on which, and the purpose for which, the deposit is made. The Judge will, at the same time, cause a written notice of the deposit having been made, to be served on the mortgagee, and will pay to him the amount deposited, on his surrendering the bill of sale or mortgage deed, or showing sufficient cause why it cannot be surrendered (b).

The Judge's notice generally calls on the mortgagee to take the money out of Court, and to deliver up the mortgage deed and such other title deeds as he may have in his possession, within a certain time,—the period named being any reasonable period, according to the distance of the mortgagee's residence from the station from which the notice is issued (c).

In all cases of mortgage by conditional sale, the mortgagor may redeem at any time either before or after the day of payment named in the contract, until the end of one year from the issue and service of notice of foreclosure by the mortgagee. The right of the mortgagor to redeem prior to the day fixed for payment, rests on express enactment (d).

But this right does not entitle the mortgagor, when the mortgage debt is by the mortgage contract payable with

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(a) *Thumbasawmy Mudelly v. Mahomed Hossain Rowthen*, L.R. 2 I. A. 241 (cf. p. 248); and compare the Transfer of Property Act, 1882, ss. 83 and 84.

(b) Ben. Reg. I, 1798, sec. 2; Ben. Reg. XXXIV, 1803, sec. 12.

(c) Cons. No. 974, 7th August 1835.

(d) *Forbes v. Ameeroonissa Begum*, 10 Moore's I. A. 340; S.C. 5 W. R. (P.C.) 47; Ben. Reg. I of 1798, sec. 2.

interest on a date specified, to tender before that date the principal sum with interest up to that time, and to have a redemption of the property. The mortgagor cannot have a partial redemption of the property under Ben. Reg. I of 1798, which was not intended (sec. 5) to alter the terms of a contract settled between the parties except as regards illegal interest. Should the mortgagee consent to allow the principal sum or part of it to be paid off before the time fixed, he would be entitled when agreeing to this to make the payment of interest a condition of such redemption (e).

In mortgages, however, entered into previous to the promulgation of Ben. Reg. XVII of 1806, there can be no redemption after the date on which it was originally stipulated that the sale should become absolute if the debt was not paid (f).

A suit was brought in Zillah Sarun in 1863 for the redemption of property mortgaged by way of conditional sale in 1801. The date on which the mortgage debt was to be paid off was the 28th September 1806. It was held (g) that Ben. Reg. XVII of 1806 took effect, not from the date on which it was passed by the Governor-General in Council (11th September 1806), but from the date of its promulgation,—and that the *onus* of showing that the Regulation was promulgated in Sarun prior to the 28th

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(e) *Burno Moyee Dossee v. Benode Mohinee Chowdhraim*, 20 W. R. 387.

(f) *Forbes v. Ameeroonissa Begum*, 10 Moore's I. A. 340; S.C. 5 W. R. (P.C.) 47; *Thumbasawmy Mudelly v. Mahomed Hossain Rowthen*, L. R. 2 I. A. 241 (cf. p. 248); *Pattabhiramier v. Vencatarow Naicken*, 13 Moore's I. A. 560 (cf. p. 572); S.C. 7 B. L. R. 136. And see *post* chap. IX. See also *supra* pp. 17—20 for the law in Madras and Bombay.

(g) *Surreyfoonnissa v. Sheikh Enayet Hossein*, 5 W. R. 88 (F.B.), overruling *Shaikh Bukshush Hossein v. Bibee Fuzzeeloonissa*, W. R. 1864, p. 189.

of September 1806, lay on the plaintiff who sued to redeem: and the suit was dismissed because he failed to give such evidence.

The steps to be taken in redeeming a mortgage by conditional sale when the mortgagee has had possession, are the same as in cases in which he has not had possession. But when the mortgagee is in possession, the mortgagor need never deposit more than the principal sum borrowed by him, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession. And if the mortgagor deposits a sum less than that required by law, that is to say, less than the principal, alleging that the sum so deposited is the total amount due to the lender for principal and interest, after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and the usual notice given to the mortgagee; and if on investigation, it appears that the amount so deposited is the total amount due, the right of redemption will have been preserved to the mortgagor, and he will be entitled to recover his lands (*h*).

• The mortgagor is entitled to receive possession summarily on depositing the principal sum borrowed, leaving the interest to be settled on an adjustment of the mortgagee's receipts and disbursements during the period he has been in possession (*i*). This adjustment must be carried out by a regular suit, one of the results of which may be the mortgagor's recovering his deposit or a part of it, if it exceeded what was really due. If the mortgagor is unwilling to deposit the whole principal sum, alleging that the whole, or part of it, has been

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(*h*) Ben. Reg. 1 of 1798, ss. 2 and 3.; Ben. Reg. XVII of 1806, sec. 7. And see *Sakriman Dichut v. Dharam Nath Tewari*, 3 B.L.R. (a. c. j.) 141.

(*i*) Cons. No. 339, 25th May 1821.

paid, he can obtain possession of his lands only by regular suit.

It has been said that in all instances in which the lender on a bye-bil-wufa, kut-kubala, or mortgage by conditional sale has been in possession, he must account to the mortgagor for the proceeds of the estate while in his possession, in the same manner as in cases of a pure usufructuary mortgage (j). But the Privy Council in the case of *Forbes v. Ameroonissa Begum* (k) decided that this is not so, and show distinctly in what cases alone an account is necessary. Their Lordships say,—“The order of remand can be supported only on the principle that in all cases it is imperative upon a mortgagee who has been in possession to produce his accounts. For this position their Lordships can find no grounds in the Regulations. The words of the 3rd section of Reg. I, 1798, from which (if at all) an inflexible obligation to produce the accounts must be inferred, are ‘In all instances wherein the lender on a bye-bil-wufa may have been put in possession of the land, and an adjustment of accounts may consequently become necessary between him and the borrower, the lender is to account,’ &c. Two conditions are expressed: the possession of the mortgagee and the necessity of an account. And a comparison of this with the preceding sections and with Regulation XVII, 1806, shows that that necessity arises, and need only arise, *Firstly*, when the mortgagor has deposited the principal, leaving the question of interest to be settled on an adjustment of the account: *Secondly*, when he has deposited all that he admits or alleges to be due: and *Thirdly*, when he pleads, and undertakes to prove, that the whole of the principal and interest has been liquidated by the usufruct of the property.”

(j) *Jadoobungsee Sahoy v. Moheeput Singh*, S.D.A., 1855, p. 432; *Chowbey Hurbuns Rae v. Chowdree Petum Singh*, S.D.A. N.W.P., 1854, p. 371. See also *supra* p. 377 *et seq.*

(k) 10 Moore's I.A. 340; S.C. 5 W.R. (P.C.) 47.

The latter clause of sec. 3 of Ben. Reg. I, 1798, is as follows:—"But such part of the Regulation as directs that the mortgages therein referred to, are to be considered as cancelled and redeemed whenever the principal sum with the simple interest due upon it, shall have been realized from the usufruct of the mortgaged property, or otherwise liquidated by the mortgagor, being inapplicable to conditional sales where the mortgagee has enjoyed the usufruct, it is hereby declared not to apply thereto." The object of this declaration apparently was to show that in the case of an usufructuary mortgage by conditional sale, foreclosure may take place, whereas it cannot occur in the case of a pure usufructuary mortgage; and that it is only when the principal with simple interest has been realised from the usufruct or otherwise, *prior to the expiry of one year from the date of the mortgagee's issuing and serving notice of foreclosure*, that such a mortgage will be considered virtually and in effect cancelled and redeemed. It was, in fact, intended to limit the application of the word "whenever." And its application is necessarily so limited: for in all cases, if foreclosure has once finally taken place, the mortgagor's interest in the land is at an end, and he has no further claim on it.

If it were not that Ben. Reg. I of 1798, sec. 2 enables the mortgagor to redeem as early as he pleases, the object of the declaration might be taken to be to recognise the right of the mortgagee to resist being redeemed prior to the day of payment named in the mortgage deed. Under the English law the mortgagee has that right (l).

There has, however, been a good deal of discussion and misunderstanding as to this clause (m).

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(l) 2 Fisher's Law of Mortgage, 3rd Ed., p. 729. And see *supra* p. 336 *et seq.* for the general law in India.

(m) *Sheikh Bukshoo v. Bheekaree Khan*, S.D.A., 1851, p. 632; *Musst. Hurdoorga Chowdraine v. Kaleenath Bhoomeek*, S.D.A., 1852, p. 831.

One who sues to redeem, whether before or after the time limited in the deed of mortgage, on the ground that the mortgagee has realised his debt from the usufruct of the property, need not make any deposit in Court if he denies that any balance is due (*n*).

A mortgagor sued for redemption before the time stipulated, alleging that the debt had been paid off from the usufruct, but making no deposit. The Court said :—" The enactment which most clearly lays down the principles upon which a conditional seller should proceed, if he desires to redeem his estate, is Reg. I of 1798. Section 2 (o) commences by declaring that the borrower is 'at liberty to pay the amount due, on or before the date stipulated.' This sentence provides both for the *time* at which he may pay, and also for the *amount* to be paid, that is to say, the 'amount due.' But to avoid doubts, the law goes on to declare how this 'amount due' is to be ascertained. It is at first supposed by the law to be the principal sum, with or without interest according to circumstances. Such a deposit will secure redemption : but it by no means follows that the deposit of even a less sum will not have the same effect, for the law goes on to say :—" Provided, however, that if the borrower deposit a less sum, alleging that the sum so deposited is the total *amount due* to the lender for principal and interest after deducting the proceeds of the land in his possession, such deposit shall be received ; and if the amount so deposited be the total amount due, the right of redemption shall be considered to have been preserved.' Now, if the borrower has not the power of demanding an adjustment of accounts in a regular suit for redemption, the Court do not see how the provisions of this law are to be enforced. The *amount due*

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(*n*) And compare the Transfer of Property Act, 1882, sec. 62, cl. (a).

(o) Ben. Reg. XXXIV of 1803, sec. 12.

can be ascertained, only after deducting the proceeds of the land. There is no limit to the smallness,—it might be one rupee, it might be nothing. Section 3 confirms the foregoing section, and more particularly declares that the account is to be made up ‘on the principles prescribed with regard to mortgages, as far as the same may be applicable to the nature of the case.’ But there is one rule in regard to mortgages, which is not applicable to conditional sales, and the remaining part of section 3 makes the exception accordingly. Were it not for this special exception, no sale could ever become absolute, the words of the mortgage law being that ‘mortgages are cancelled and redeemed *whenever* the principal with interest shall have been realised from the usufruct.’ For, although a bye-bil-wufa may not have been redeemed by the usufruct or otherwise during the stipulated period, it may have been redeemed by the proceeds of the land during the years which followed the stipulated period; and if such proceeds could be taken into account, it is clear that no sale could ever become absolute. The Court see nothing in Reg. XVII of 1806, or in any subsequent Regulation, to affect the above construction of the law. The provisions of Reg. XVII of 1806 are *in addition to*, not in supercession of former laws, and the object of this enactment was to give the mortgagor additional facility of redemption, by enabling him to recover possession whenever he chose to pay down the principal, with or without interest according to circumstances, leaving the *account* to be adjusted subsequently in a regular suit under the provisions of the law (Reg. I of 1798) already referred to” (p).

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(p) *Ram Dass v. Byroperashad*, S.D.A. N.W.P., 1850, p. 456. But see *Petition No. 485 of 1845*, S.D.A., 1847, p. 48; *Zeinut Begum v. Bheekun Lal*, S.D.A., 1849, p. 392; *Jadoobungsee Sahoy v. Moheeput Singh*, S.D.A., 1855, p. 432; *Meer Khyrat Alee v. Gowhurrunnissa*, S.D.A., 1857, p. 503.



There was a mortgage in the English form, but in the nature of a conditional sale. By the deed it was agreed that the principal should be repayable on the 4th of September 1868,—and a power of sale was given to the mortgagee in the event of the mortgagor making default in the regular payment of interest. Default having been made, the mortgagee attempted to foreclose in 1866. But the Court held that the mortgagor had (notwithstanding his default in the payment of interest) the right to redeem until the 4th of September 1868, and further until the expiry of the year of grace based on foreclosure proceedings instituted subsequent to that date by the mortgagee. "The year of grace, commencing as it does with the notification which follows on the mortgagee's application for foreclosure, is intended by the legislature to be additional to the period which is stipulated for redemption in the mortgage contract: and therefore it follows that the application itself cannot be made before the expiration of that 'stipulated period.' Now the 'stipulated period' of redemption referred to in this Regulation (XVII of 1806, sec. 7) appears to us to be the whole period prescribed by the mortgage contract for the performance of the conditions upon the fulfilment of which the mortgagor is to be entitled to a reconveyance. We do not think it, in any case, means less than this or depends upon whether the mortgagor duly performs all those conditions or not" (q).

A mortgagor seeking an account from his mortgagee, and to redeem, must aver in his plaint, that the principal sum with interest has been tendered or been realised from the usufruct or otherwise (r). If he states an agreement

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(q) *Sremati Sarasibala Debi v. Nand Lal Sen*, 5 B.L.R. 389 (cf. p. 393).

(r) See *Nelram v. Chynsookh*, S.D.A. N.W.P., 1856, p. 3; *Chowbey Harbuns Rae v. Chowdree Petum Singh*, S.D.A. N.W.P., 1854, p. 371; *Jadoobungsee Sahoy v. Moheeput Singh*, S.D.A., 1855, p. 432.

to pay and receive interest at less than twelve per cent., and it appears from his own account that the debt cannot have been paid off prior to the institution of the suit if a higher rate were allowed, he must establish the agreement for the reduced interest, or his suit will be dismissed (s).

It has been held that if it appears from the mortgagor's own evidence, that he is not in a position to redeem in consequence of a balance being still due to the mortgagee, the suit is to be dismissed at once (t); and that when, on investigating the accounts, the receipts from the usufruct or these receipts together with sums deposited or paid to the mortgagee, are found not to cover the amount due, the suit must be dismissed, however small the deficiency may be (u), and that the Court cannot give a conditional decree that, on payment of the balance due, the mortgage is to be held redeemed (v).

More recently, however, the practice (in the Calcutta Court at any rate) has been not to dismiss the suit wholly because a balance is found to be still due to the mortgagee,

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(s) *Mouzzum Alee v. Musst. Wajidah*, S.D.A., 1852, p. 748. See also *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 12 Moore's I.A. 157 (cf. p. 201); S.C. 2 B.L.R. (P.C.) 44 (cf. p. 59).

(t) *Khyratee Ram v. Mussumat Seetoo*, S.D.A. N.W.P., 1851 p. 221.

(u) *Zeinut Begum v. Bheekun Lall*, S.D.A., 1849, p. 392; *Petition No. 577 of 1852*, S.D.A., 1852, p. 1120; *Sheo Buksh v. Ahmud Khan*, S.D.A. N.W.P., 1849, p. 37; *Mathuram v. Dhurm Singh*, S.D.A. N.W.P., 1850, p. 104; *Muhummud Khan v. Mussumat Heengun*, S.D.A. N.W.P., 1855, p. 543.

(v) *Nawab Azimut Ali Khan v. Jowahir Sing*, 13 Moore's I.A., 404 (cf. p. 412); *Muhummud Khan v. Mussumat Heengun*, S.D.A. N.W.P., 1855, p. 543; *Oomrao Khan v. Hashman*, S.D.A. N.W.P., 1860, p. 84; *Shah Kimdun Lall v. Susta Koer*, 8 W.R., 369; *Mussumut Motee Soonderee v. Maharanee Indrajit Kowaree*, Marsh. 112.

but to ascertain what the exact balance is and to declare that the mortgage shall be redeemed upon payment within a reasonable time fixed by the Court (*w*).

And the practice would appear to be the same in the Allahabad Court. For it has been held by that Court in a case in which the defendant objected to the decree on the ground that it was a conditional one, whilst the plaintiff objected to it on the ground that it fixed a period for payment, that a conditional decree fixing a period for payment of money found to be due on mortgage bonds entitling the mortgagor to redemption, though not claimable as of right by the mortgagor, who ordinarily should be ready at once with his money, is a proper and judicious order to be passed by an Appellate Court, where the Court of first instance has determined the amount payable under the mortgage, but has failed to fix any time in its decree for payment of such amount (*x*). And in another case where the plaintiffs sued to recover possession of certain lands, alleging that the defendants had obtained possession of them from the plaintiffs as usufructuary mortgagees and that the mortgage debt had been satisfied from the usufruct of the land and the lower Court, although it found that the mortgage debt had not been satisfied as alleged, gave the plaintiffs a decree for possession conditional on the payment of the balance of the mortgage debt, it was held by the same Court that, inasmuch as the defendants never rendered any accounts, and inasmuch as no agreement had

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(*w*) *Baboo Kullyan Dass v. Baboo Sheo Nundun Purshad Singh*, 18 W.R. 65; *Shah Lutafut Hossein v. Chowdhry Mahomed Moonem*, 22 W.R. 269; *Rajah Saheb Perladh Singh Bahadoor v. Broughton*, 24 W.R. 275. See also *Mokund Lall Sookul v. Goluck Chunder Dutt*, 9 W.R. 572; *Boistub Doss Koondoo v. Huro Narain Haldar*, 17 W.R. 408. And see *ante* pp. 382, 383, and compare the Transfer of Property Act, 1882, ss. 92 and 93.

(*x*) *Raja Barda Kant Rai v. Bhagwan Das*, I.L.R. 1 All. 344.

been made between the parties as to the amount at which the profits of the lands should be estimated, it was impossible for the plaintiffs to have ascertained before suit what sum, if any, was due by them, and seeing that whether the decree was altered or not, the plaintiffs might immediately pay the balance of the mortgage debt and demand possession, it was unnecessary to interfere with the decree (y).

A mortgagor who has got a decree to redeem and to be put in possession, may bring a subsequent suit for mesne profits for the time during which the mortgagee remained in possession *after* the institution of the suit (z).

If the mortgagee in a non-usufructuary mortgage by conditional sale, chooses to enter into possession and to remain in possession wrongfully, he must account fully for the mesne profits (a).

A mortgagee after having done all that Ben. Reg. XVII of 1806, sec. 8 requires to be done in order to foreclose the mortgage and make the conditional sale absolute (*i.e.*, after service of notice of foreclosure, and expiry of the year of grace, &c.) must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession. In that suit the mortgagor may contest, on any sufficient grounds, the validity of the conditional sale, or the regularity of the proceedings taken under the Regulation in order to make it absolute. He may also allege and prove, if he can, that

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(y) *Sahib Zadah v. Parmeshar Das*, I.L.R. 1 All. 524.

(z) *Baboo Gour Kishen Singh v. Sahay Fukeer Chund*, 7 W. R. 364.

(a) *Nilkant Sein v. Shaiikh Jaenooddeen*, 7 W.R. 30; and see the remarks on this case by Mahmood, J., in *Jaijit Rai v. Gobind Tiwari*, I.L.R. 6 All. 303 (*cf.* p. 309).

nothing is due, or that the deposit (if any) which he has made is sufficient to cover what is due. But the issue, in so far as the right of redemption is concerned, will be whether anything, at the end of the year of grace, remained due to the mortgagee, and if so whether the necessary deposit had been then made. If that is found against the mortgagor, the right of redemption is gone. But so long as the mortgagee remains quiet after the expiry of the year of grace and does not sue to have his title declared absolute, the mortgagor's right of redemption remains unimpaired—save that he must prove that the mortgage debt was in fact paid off, or the necessary deposit made, before the expiry of the year of grace (b). And as a general rule a mortgagor can raise, in a suit instituted by himself after the expiry of the year of grace, any question which he could use by way of defence in a suit brought by the mortgagee for possession. As in a suit instituted by a mortgagee for possession or to declare his title as absolute proprietor on foreclosure, the mortgagor might plead satisfaction of the mortgage debt prior to the expiry of the year of grace, so the mortgagor is entitled to raise the same question in a suit brought by himself for redemption (c).

On the expiry of the year of grace, the rights of the mortgagor are at an end, unless he can prove that the mortgage debt was in fact liquidated before the year expired. And one suing to redeem must under the old law do so within twelve years from the date on which the year of grace came to an end: now however there apparently is

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(b) *Forbes v. Ameeeroonissa Begum*, 10 Moore's I.A. 340; S.C. 5 W.R. (P.C.) 47; *Purtaab Nurain v. Sheo Suhase Singh*, S.D.A., 1848, p. 711; *Debee Doss Dutt v. Mohunlal Sookul*, S.D.A., 1859, p. 127.

(c) *Meer Khyrat Alee v. Gowhurrunnissa*, S.D.A., 1857, p. 503.

no limitation save that of sixty years from the date of the mortgage (*d*).

The preceding remarks apply only to places in which the Bengal Regulations are in force. In Madras and Bombay there is no summary procedure for the redemption of mortgages by conditional sale (*e*) and a mortgagor in these provinces, who is desirous of enforcing his right of redemption by judicial process, must bring a regular redemption suit. In such a suit if the plaintiff succeeds, the usual procedure is, it is believed, very similar to that followed by the Courts in England (*f*), and which has been adopted by the framers of the Transfer of Property Act, 1882 (*g*). The Court passes a decree, either declaring the amount due on the mortgage, or that an account be taken of such amount (*h*), and directing that, on payment of this amount by the plaintiff to the defendant within a fixed time (usually six months), the defendant do deliver up to the plaintiff all documents in his possession or power relating to the mortgaged property,

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(*d*) Act XIV of 1859, sec. 1, cl. 12; Act IX of 1871, Sch. 2, Art. 148; Act XV of 1877, Sch. II, Art. 148; *Musst. Luteefun v. Musst. Zoohoorun*, S.D.A., 1854, p. 137; *Nilambur Mujoomdar v. Parbutteechurn Mujoomdar*, S.D.A., 1859, p. 1494; *Moonshee Kalipersad v. Sheopershad*, S.D.A., 1861, vol. 1, p. 8; *Lotf Hossein v. Abdool Ali*, 8 W.R. 476.

(*e*) As to the redemption of mortgages by conditional sales in these provinces see *supra* pp. 17—20. In the more recent Bombay case of *Kanayalal v. Pyarabai*, I.L.R. 7 Bom. 139, the view taken by the High Court in *Bapuji Apaji v. Senavaraji Marvadi*, I.L.R. 2 Bom. 231, has been re-affirmed, and a clause of conditional sale contained in a mortgage deed has been declared not to prevent the redemption of the mortgage.

(*f*) For the form of decrees in England, see Seton on Decrees, 4th Ed., vol. II, part I, p. 1040.

(*g*) See Act IV of 1882, secs. 92 and 93.

(*h*) It is believed that in the subordinate Courts it is more usual for the Court itself to ascertain the amount due before passing a decree.

and retransfer it to the plaintiff free from the mortgage and all incumbrances created by him (the defendant), or any person claiming under him, but that if the plaintiff fails to pay the amount within the time so fixed, he shall be absolutely debarred of all right to redeem the property. In those cases in which the mortgagor is in possession of the mortgaged property (i), the decree should direct that in the event of the amount found due by the plaintiff to the defendant being paid within the time limited, the defendant should deliver up possession of the mortgaged land to the plaintiff.

In a recent Bombay case, the facts were that the applicant, an agriculturist mortgagor, sued the defendant, the mortgagee, for redemption on the terms provided by the Dekkhan Agriculturists' Relief Act, 1879. The account was made up, and the mortgagee was directed to pay the sum found to be due within six months, or to be for ever foreclosed. He failed to pay within the time fixed; and afterwards applied under sec. 15 (B) of the Act as amended by Act XXII of 1882, to be allowed to pay the amount of the decree by instalments. It was held that the order could not be made. The Court, in giving its grounds for this decision, made the following observations on the ordinary practice in the Bombay Mofussil with regard to redemption decrees, according to which the property, on failure of the plaintiff to pay the sum found to be due within the fixed time, vests in the mortgagee. "The second order—which, according to the practice of the English Equity Courts, is applied for after the expiration of the time prescribed for redemption—is made as of course on such application (j). It appears to be contemplated by the Form No. 129 appended to the

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(i) As to this, see *supra* p. 21.

(j) 2 Fisher's Law of Mortgage, 3rd Ed., p. 1771.



Code of Civil Procedure, but it is not prescribed in the Act itself. In this Presidency it has not been used. The mortgage called *lahan-gahan* (*k*) stipulates for transfer of the ownership to the mortgagee on non-payment of the debt at a specified date. The Court interferes with the literal terms of this contract, but on condition of satisfaction being made within a defued time. Failing this, effect is given to the contract by allowing the property to pass to the mortgagee and conditional vendee. No second order is generally necessary when a condition has been fulfilled, which has made a prior order operative. The ownership is constituted by an act of the Court, equally under a first order as under a second or a third, which would be made as of course. In the cases in which the mortgage deed has not so expressly provided for a transfer of the ownership on failure of payment, the analogy of the *lahan-gahan* mortgage has, in many instances, been followed. Sometimes a sale is ordered, sometimes a foreclosure. The latter is the common order when the mortgagor sues the mortgagee to redeem the property. It gives him time to make the requisite arrangement, and if he had desired a sale, he could have applied for it. When the order for a foreclosure is made, it operates of itself to transfer the ownership when the time has expired, and the ownership having passed to the mortgagee cannot be taken back from him by a subsequent order not founded on any new transaction or change in the jural relation of the parties. Until the order operates to transfer the ownership, it is subject to revision on good cause shown. After it has operated, the effect can be got rid of only on some special ground, such as fraud or inevitable accident which should be the subject of a special proceeding" (*l*).

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(*k*) As to these mortgages, see *supra* p. 15, note (*o*).

(*l*) *Ladu Chimaji v. Babaji Khanduji*, I.L.R. 7 Bom. 532.

In a case in the Bombay Court, it appeared that a Mahomedan had given a bye-bil-wufa to a Parsi, who was put in possession. In a suit to redeem, it was held that (under the Bombay Regulation IV of 1827, sec. 26) the law to be applied was that of the defendant in possession, viz., justice, equity and good conscience: and that as part of the mortgaged premises had been burnt through no fault of the mortgagee and had been rebuilt by him, there could be no redemption save on paying to the mortgagee the amount so expended by him properly (m).

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(m) *Mancharsha Ashpandiarji v. Kamrunisa Begam*, 5 Bom. H.C. (a.c.j.) 109.

## CHAPTER IX.

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### OF THE REMEDIES OF THE MORTGAGEE, INCLUDING FORECLOSURE.

THE mortgage debt being the principal, and the land pledged being merely a security, the mortgagor, notwithstanding his breach of condition, still continues relievable from the strict letter of his contract, on payment of principal, interest, and costs. But this, except in the case of pure usufructuary mortgages, is only in the event of the mortgagee not coming forward and seeking the assistance of the law to enable him to enforce his security, which assistance will be granted to him, in order that he may not remain subject to a perpetual account, or be deprived for ever of the money advanced by him. On this principle rests the doctrine of foreclosure (*a*), in the application of which, the forbearance of the law towards the mortgagor is carried very far. The mortgagee, however, when once he has obtained his decree declaring his title as absolute proprietor on foreclosure, is freed from all further uncertainty, as the foreclosure can never be opened or disturbed on other grounds than those on which the Courts will in ordinary cases set aside their own decrees. In England, the Courts are always anxious to afford every reasonable relief to the mortgagor, and even after a decree of foreclosure has been made, and the mortgagee has obtained possession they will, under special circumstances, open the decree (*b*).

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(*a*) As to the nature of the doctrine of foreclosure as defined in the Transfer of Property Act, 1882, see sec. 67 of that Act.

(*b*) See 2 Fisher's Law of Mortgage, 3rd Ed., pp. 1054—1059.

And the analogy of the English rule has been followed by the Calcutta Court. In the case referred to it was held that a purchaser of a portion of certain property subject to two mortgages, who had also purchased the mortgagee's interest in both mortgages, and had foreclosed the first mortgage in order to satisfy the debt due under it, had no right to sue the defendant personally for the debt due upon the second mortgage, as though that debt were not a charge upon the mortgaged property at all, and he himself were not liable for his proportion of it; and that the bringing of the second suit had the effect of reopening the foreclosure, or preventing the foreclosure proceedings being confirmed or sanctioned by the Court, and of enabling it to make a decree, which would at once secure to the plaintiff his just rights, and at the same time oblige him to do equity as regards the defendant (c).

The limitation of suits instituted on and after the 1st of April 1873, but prior to the 1st of October 1877, was regulated by Act IX of 1871; since the latter date, however, Act XV of 1877 has been in force.

In suits to enforce payment of money charged upon immoveable property the period is twelve years, and it commences to run from the time when the money sued for becomes due (d). The allowance and fees respectively called *malikana* and *haks* are deemed to be money charged upon immoveable property (e). The same provisions were contained in Act IX of 1871 (f).

It has been held that a bond, whereby the superstructure of a house, exclusive of the land beneath, is hypothecated,

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(c) *Kaliprosunno Ghose v. Kamini Soonduri Chowdhraïn*, I. L. R. 4 Calc. 475 (cf. p. 481).

(d) Act XV of 1877, Sch. II, Art. 132.

(e) *Ibid*, Expl.; and see *Hurmuzi Begum v. Hirdaynarain*, I. L. R. 5 Calc. 921.

(f) Act IX of 1871, Sch. II, Art. 132.

creates an interest in immoveable property,—the apparent intention being to mortgage the house and not merely the materials of which it was composed (*g*).

A suit for recovery of Government revenue, which the defendant was bound to pay, but which has been paid by the plaintiff to save the whole estate from sale; when the plaintiff asks to have the amount so paid made a charge on the portion for which he paid it, is governed by Art. 132 of Act XV of 1877 (*h*).

In a suit instituted on the 28th April 1881 where the plaintiff held a mortgage of certain immoveable property to secure the repayment of a loan with interest, and where the mortgage which was dated the 16th February 1870 contained a personal undertaking to pay, and the plaintiff based his claim in the suit upon such personal undertaking, and applied for leave to reserve his remedies under the mortgage, and thus sought for only a money decree, the Bombay High Court held that the suit was barred inasmuch as Art. 132 was meant to apply to suits brought to enforce *against the property* payment of money charged upon immoveable property and not under any circumstances whatever to a suit for a mere money decree (*i*).

But this decision has been overruled by a Full Bench of the same Court (*j*). The judgment of the Full Bench, after comparing the law as contained in the Acts of 1859, 1871 and 1877, proceeded as follows (*k*): "It must be admitted that these changes in the law have introduced difficulties with which this Court had not to contend, when considering the question with reference to the provisions

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(*g*) *Narayana Pillay v. Ramaswamy Thavutharan*, 8 Mad. H. C. 100. See also *Winterscale v. Gopal Chandra Seal*, 3 B. L. R. (o c j.) 90.

(*h*) *Ram Dutt Singh v. Horakh Narain Singh*, I. L. R. 6 Cal. 549.

(*i*) *Pestonji Bezoni v. Abdool Rahiman*, I. L. R. 5 Bom. 463

(*j*) *Lallubhai v. Naran*, I. L. R. 6 Bom. 719.

(*k*) *Ibid*, cf. p. 723.

of the Act of 1871. But upon a careful consideration of the whole subject, and bearing in mind that, in cases of doubt, an Act of Limitation ought to be construed in the manner most favourable to the person whose right is the subject of the limitation, we have come to the conclusion that Art. 132 of the last Act ought to be held applicable to a suit by a mortgagee to obtain a mere money decree. The explanation to the article provides that 'the allowance and fees respectively called *malikana* and *haks* shall, for the purpose of this clause, be deemed to be money charged upon immoveable property.' Now suits for *malikana* and *haks* are ordinarily suits for mere money decrees, and therefore the explanation is opposed to the supposition that the article was intended to apply exclusively to suits to enforce payment out of immoveable property; and, although the introduction of a special provision for the enforcement of a mortgage by foreclosure or sale (Art. 147) (*l*) may point to the conclusion that the legislature intended the word 'charge' in Art. 132 to bear the same meaning as in sec. 100 of the Transfer of Property Act (which says that 'where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a *charge* on the property') yet it cannot be denied that money lent on mortgage is, in ordinary legal phraseology, money charged upon immoveable property, and that, therefore, a suit by a mortgagee for a money decree is strictly within the words, though possibly not within the intention, of the article in question."

This ruling has been followed by the Madras High Court (*m*)

(*l*) See *infra*, p. 416.

(*m*) *Davani v. Ratna*, I. L. R. 6 Mad. 417; but compare *Sabapati Chetti v. Chedumbara Chetti*, I. L. R. 2 Mad. 397, in which it seems to have been assumed that Art. 132 of Act XV of 1877 did not apply to a claim for a personal decree upon a mortgage bond.

but not by the Allahabad High Court which, declining to depart from the current of previous decisions in that Court, has recently held that in a suit by a mortgagee to enforce the mortgage, Art. 116, (which prescribes a period of only six years) and not Art. 132 of Sch. II of Act XV of 1877 is applicable, so far as relief against the mortgagor personally is claimed (*n*).

In a suit instituted in a Court not established by Royal Charter (*i.e.*, not one of the High Courts) by a mortgagee for possession of immoveable property mortgaged, the period of limitation is twelve years running from the time when the mortgagor's right to possession determines (*o*).

The period allowed by the Act of 1871 for such suits was the same commencing to run from the time when the mortgagee was first entitled to possession (*p*).

When by the express terms of the deed, a mortgagee by conditional sale has a right to take possession upon default by the mortgagor in payment of the mortgage money, it was held by the Calcutta High Court that under Art. 135 of the Act of 1871 he must sue for possession within twelve years of the time, when he was first entitled to possession under the deed (*q*).

But though a suit for possession by such a mortgagee, who had taken no proceeding to alter his position within twelve years from the time that he was first entitled to possession, was barred, yet, where he had within that time,

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(*n*) *Raghubar Dayal v. Lachmin Shankar*, I. L. R. 5 All. 461.

(*o*) Act XV of 1877, Sch. II, Art. 135.

(*p*) Act IX of 1871, Sch II, Art. 135.

(*q*) *Lall Mohun Gungopadhyay v. Prosunno Chunder Banerjee*, 24 W.R. 433 as explained in *Burmamoye Dassee v. Dinobhindhoo Ghose*, I. L. R. 6 Calc. 564 (*cf.* pp. 568—569), and *Modun Mohun Chowdhry v. Ashad Ally Beparee*, I. L. R. 10 Calc. 68 (*cf.* p. 71); and compare *Denonath Gangooly v. Nursingh Proshad Doss*, 14 B. L. R. 87; S.C. 22 W.R. 90, noted *infra*, p. 422, which was a case under Act XIV of 1859.



by taking foreclosure proceedings, changed his interest as mortgagee to that of absolute owner, he was entitled under Art. 145 of the same Act to bring a suit for possession at any time within twelve years from the expiration of the year of grace (r); and the principle of this decision was followed in a later case, in which the Court very fully discussed all the law and authorities bearing on the point (s).

The language of the corresponding article of the present Act has, as noticed above, been changed. The object of the change was, as appears from the Report of the Select Committee (t), to "meet the case of the mortgagor and mortgagee agreeing to go on upon the footing of the mortgage after the mortgage term has expired." If this is the effect of the change, the word "determines" should apparently be construed to mean "ceases and has not been renewed," and this construction is supported by the omission of the word "first." For if the word "determines" is applicable to a mere temporary breach of the right to possession, it is difficult to see how the meaning of the article is altered. It may be questioned whether, under the Act 1871, the mortgagee's right could accrue without the mortgagor's right being interrupted.

But where there is no stipulation in the mortgage deed as to possession being taken by the mortgagee on default of payment by the mortgagor, then limitation can only commence to run under either the Act of 1871 or the Act

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(r) *Ghinaram Dobey v. Ram Monaruth Ram Dobey*, I. L. R. 6 Calc. 566 note; S.C. 7 C. L. R. 580.

(s) *Burmamoye Dassee v. Dinobundhoo Ghose*, I. L. R. 6 Calc. 564; see also *Jeora Khun Singh v. Hookum Singh*, 5 N.W.P. (Agra) H.C. 358 there referred to.

(t) See the Report of the Select Committee on the Limitation Bill of 1877, dated 13th June 1877.

of 1877, from the expiration of the year of grace, after foreclosure proceedings have been taken.

Thus there was a mortgage by conditional sale, which did not contain any stipulation that the mortgagees should be entitled to possession on default of payment by the mortgagor. On default by the mortgagor, the mortgagees in 1856 took the usual foreclosure proceedings, and after the expiration of the year of grace brought a suit to recover possession, but were defeated on account of some irregularity in the foreclosure proceedings. They then, some years later in 1879, took fresh foreclosure proceedings, and at the expiration of the year of grace again brought a suit for possession. On the plea that the suit was barred by limitation, the High Court held that limitation did not begin to run when the first foreclosure proceedings came to an end, because they were void for irregularity, nor from the date when default was made in payment of the mortgage money, because there was no stipulation in the case that the mortgagee should be entitled to possession on such default, but from the expiration of the year of grace, after the foreclosure proceedings in 1879, and that, therefore, the suit was in time (*u*).

The Court in its judgment in the above case does not state what article of the Limitation Act was applicable to the suit, but it would appear from the decisions above quoted that the suit, being subsequent to foreclosure, was brought by a person entitled to possession as absolute owner and not as mortgagee, and therefore that Art. 144, and not Art. 135, of the Act of 1877 was applicable to it.

It would seem also to follow as a result of all the cases that Art. 135 of that Act can apply only in cases where the mortgage-deed contains an express condition,

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(*u*) *Modum Mohun Chowdhry v. Ashad Ally Beparee*, I. L. R. 10 Cal. 68.

transferring possession from the mortgagor to the mortgagee on default.

In a suit instituted in a Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction by a mortgagee to recover from the mortgagor the possession of immoveable property mortgaged the period of limitation is thirty years, and it begins to run from the time when any part of the principal or interest was last paid on account of the mortgage debt (*v*). The corresponding period under Act IX of 1871 was sixty years (*w*), and under Act XIV of 1859 only twelve years (*x*).

Where a foreclosure suit was barred by Act XIV of 1859, as being brought more than twelve years after the cause of action arose, and it was admitted that no part of the principal or interest of the mortgage debt had been paid, it was held that as Act XIV of 1859 not only barred the remedy but extinguished the right, the plaintiff could derive no advantage from the extended period of limitation given by Art. 149 of Act IX of 1871 which repealed the Act of 1859, and which, moreover, only applied to cases in which some part of the principal or interest of the mortgage debt had been paid (*y*).

In a suit by a mortgagee for foreclosure or sale the period of limitation is sixty years, commencing to run from the time when the money secured by the mortgage becomes due (*z*). This is a new provision which was not contained in Act IX of 1871. Under that Act the Bombay High

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(*v*) Act XV of 1877, Sch. II, Art. 146.

(*w*) Act IX of 1871, Sch. II, Art. 149.

(*x*) Art. XIV of 1859, sec. 1, cl. 12.

(*y*) *Ram Chunder Ghosaul v. Juggutmonmohiney Dabee*, I. L. R. 4 Calc. 283; S.C. 3 C. L. R. 336. See also *Brojonath Koondoo Chowdry v. Khelut Chunder Ghose*, 14 Moore's I. A. 144; S.C. 8 B. L. R. 104.

(*z*) Act XV of 1877, Sch. II, Art. 147.

Court held that the period of limitation for a suit for foreclosure heard by it in the exercise of its Ordinary Original Civil Jurisdiction was either twelve years under Art. 132 or sixty years under Art. 149 (a).

If before the expiration of the period prescribed for a suit or application in respect of any property or right an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation according to the nature of the original liability is to be computed from the time when the acknowledgment was so signed, and when the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed, but oral evidence of its contents cannot be received (b).

An acknowledgment is sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set off, or is addressed to a person other than the person entitled to the property or right (c). Such acknowledgment may also be signed either personally by the party against whom the property or right is claimed or by some person through whom he derives title or liability, or by an agent duly authorised in that behalf (d).

When interest on a debt, or part of the principal of a debt is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt, or by his agent

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(a) *Ganpat Pandurang v. Adarji Dadabhai*, I. L. R. 3 Bom. 312.

(b) Act XV of 1877, sec. 19.

(c) Act XV of 1877, sec. 19, Expl. 1.

(d) *Ibid*, Expl. 2.

duly authorised in that behalf, a new period of limitation, according to the nature of the original liability, is to be computed from the time when the payment was made; provided that in the case of part payment of the principal of a debt the fact of the payment appears in the handwriting of the person making the same. When mortgaged land is in the possession of the mortgagee, the receipt of the produce of such land is to be deemed to be a payment for the purpose of this provision (e).

Nothing in the above provision renders one of several joint contractors, partners, executors, or mortgagees chargeable by reason only of a written acknowledgment signed, or of a payment made by, or by the agent of any other or others of them (f).

These provisions declaring that acknowledgments and payments of interest or part payments of principal create a fresh period from which limitation commences to run differ somewhat from those contained in Act IX of 1871. Though the alterations in the law is rather one of form than of substance, it may be as well for the purpose of comparison to state what the corresponding provisions under that Act were. Under it no promise or acknowledgment in respect of a debt took the case out of the operation of the Act unless the promise or acknowledgment was contained in some writing signed, before the expiration of the prescribed period, by the party charged therewith or by his agent generally or specially authorised in that behalf. But when such writing existed a new period of limitation according to the original liability was to be computed from the time when the promise or acknowledgment was signed. When the writing containing the promise or acknowledgment was undated, oral evidence might be given of the time

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(e) Act XV of 1877, sec. 20.

(f) *Ibid*, sec. 21.

when it was signed. But when it was alleged to have been destroyed or lost, oral evidence of its contents could not be received (*g*).

An acknowledgment was sufficient, though it omitted to specify the amount of the debt, or averred that the time for payment had not yet come, or was accompanied by a refusal to pay or deliver, or was coupled with a claim to a set-off, or was addressed to any other person than the mortgagee or creditor. But it must have amounted to an express undertaking to pay the debt, or to an unqualified admission of the liability as still subsisting (*h*).

One of several partners was not rendered liable by reason only of a promise or acknowledgment signed by another partner (*i*).

The acknowledgment must have been *signed* by the person making it: and his *seal* was not sufficient, even though affixed by the debtor to a letter written by himself (*j*).

When interest on a debt was before the expiry of the prescribed period, paid as such by the person liable to pay the debt, or by his agent generally or specially authorised,—or when part of a principal debt was before the expiration of the prescribed period paid by the debtor or his agent,—a new period of limitation was to be computed from the time the payment was made. But in the case of part payment of principal, the debt must have arisen from a contract in writing, and the fact of the payment must have appeared in the handwriting of the person making the same, on the instrument, or in his own books, or in the books of the creditor (*k*).

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(*g*) Act IX of 1871, sec. 20.

(*h*) *Ibid*, Expl. 1.

(*i*) *Ibid*, Expl. 2.

(*j*) *Ibid*, Illustration.

(*k*) *Ibid*, sec. 21.

In 1858 land was mortgaged to *A* with possession for a term of five years, at the expiry of which the mortgage debt was repayable. The mortgagor, *B*, in 1861 took a lease from *A* of the land, under which lease he paid rent till 1870-71. In a suit brought by *A* to recover the debt from *B*, the plea of limitation was raised, and *A* in reply contended that the receipt of rent was in fact a payment of interest, and that from the last payment of rent a new period of limitation arose. The Madras High Court, however, held that, as the case was governed by sec. 21 of Act IX. of 1871, the payment of rent under an agreement entirely independent of the original mortgage could not be regarded as a payment of interest (*l*).

As regards suits instituted on or after the 1st of January 1862 and before April 1873, the law of limitation is to be found in Act XIV of 1859: and under it, it may be said generally that a suit for possession by a mortgagee, or for the recovery of immoveable property, or of any interest in immoveable property must be brought within the period of twelve years from the time the cause of action arose (*m*).

Lands in the mofussil were in 1845 mortgaged by a deed in the English form. The mortgagor was to remain in possession until default: but the mortgagee had a right to enter on default. The mortgagor made default, but the mortgagee took no steps to get possession. Thereafter, in 1849, the mortgagor sold part of the property, and the purchaser got possession and registered his title in the Collectorate in January 1850. An assignee of the mortgagee

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(*l*) *Ummer Kutti v. Abdul Kadar*, I. L. R. 2 Mad. 165. See also *Teagaraya Mudali v. Mariappa Pillai*, I. L. R. 1 Mad. 264; and as to the requisites of an acknowledgment by part payment under the English law, see *Tippets v. Heane*, 1 Cr. M. & R. 252.

(*m*) Act XIV of 1859, sec. 1, cl. 12. See *Koonjbeharee Lall v. Ram Narain*, 2 N. W. P. (Agra) H.C. 244; *Lakshmi Bai v. Vithal Ramchandra*, 9 Bom. H.C. 53.



subsequently brought a suit for foreclosure in the Supreme Court at Calcutta,—to which the purchaser was no party—and in 1862 obtained a decree for foreclosure. The assignee of the mortgagee then brought a suit in the mofussil against the purchaser to recover possession of the portion of the mortgaged property purchased by him. The purchaser having pleaded limitation, under Act XIV of 1859, sec. 1, cl. 12, it was held that neither he nor the property in his possession were affected by the foreclosure proceedings, and that as the mortgagor and the purchaser from him had, after default, held possession for more than twelve years, the suit was barred. In delivering judgment the Privy Council said :—“It is impossible to hold that the defendant (the purchaser) was holding or supposed that he was holding by permission of the mortgagee : and when both things concur,—possession by such a holder for more than twelve years, and the right of entry under the mortgage deed more than twelve years old,—it is impossible to say that such a possession is not protected by the law of limitation” (n).

So, where the default occurred on the 9th of July 1855, and on the 18th of December 1856 the mortgagor's rights in the property were sold in execution of a decree, and were bought, without notice of the mortgage, by a purchaser who got possession. In August 1867 the assignee of the mortgagee instituted foreclosure proceedings under Ben. Reg. XVII of 1806, against the purchaser. Having completed the foreclosure proceedings, the assignee on the 22nd of January 1872 instituted a suit against the purchaser to recover possession. But it was held that the

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(n) *Brojonath Koondoo Chowdry v. Khelut Chunder Ghose*, 14 Moore's I. A. 144 (cf. p. 150) ; S.C. 8 B. L. R. 104—affirming the decision in *Khelut Chunder Ghose v. Tarachurn Koondoo Chowdry*, 6 W.R. 269. See also *Srimati Sarasibala Debi v. Nand Lal Sen*, 5 B. L. R. 389.

cause of action of the mortgagee and of his assignee, arose on the default made in July 1855, and that the suit not having been commenced within twelve years from that date was barred under Act XIV of 1859, sec. 1, cl. 12: and that no new cause of action arose, by reason of the foreclosure proceedings, on the expiry of the year of grace in August 1868 (o).

In another case, the mortgagee might (under his mortgage deed) have taken possession on the mortgagor's making default in 1255: he did not, however, avail himself of his rights, but in 1267 sued for and obtained a decree for foreclosure. Subsequently he sued to recover possession against purchasers of the mortgagor's rights who had been in possession since 1253, but who had not been made parties to the foreclosure suit. The Court held that the mortgagee's cause of action arose on the first default made by the mortgagor in 1255, and that the decree in the foreclosure suit gave no fresh starting point (p).

These were cases of suits brought against purchasers from the mortgagor who had got into possession and had held for more than twelve years adversely to the mortgagee.

By an instrument of mortgage of 1847 it was provided that if the debt were not paid within five years, the property mortgaged should be considered as absolutely sold to the mortgagee. Default was made, and the mortgagee entered into possession and continued in possession until 1858 when he was turned out by the mortgagor. In 1866 the mortgagee filed a suit in the nature of a foreclosure suit against the mortgagor. It was held that his cause of action arose in 1858 when he was dispossessed, and that he had twelve years from that date within which to bring his suit (q).

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(o) *Denonath Gangooly v. Nursing Proshad Dass*, 14 B.L.R. 87; S.C. 22 W.R. 90.

(p) *Huro Chunder Goocho v. Gudadhur Koondoo*, 6 W.R. 183.

(q) *Lakshmibai v. Vithal Ramchandra*, 9 Bom. H.C. 53. See also *Petition No. 150 of 1848*, S.D.A., 1848, p. 722.

But as between the mortgagor and mortgagee, a default may be made by the mortgagor which may give the mortgagee a right to sue or to enter into possession, if he chooses to assert such a right, but which may notwithstanding have no effect whatever in altering the nature of the mortgage title. If notwithstanding one or more defaults, there be no repudiation of the mortgagee's right, but on the contrary a recognition of it, there is nothing in the law to limit the time within which the mortgagee may foreclose—"So long as the mortgagor in possession, or those who claim under him, assert merely a title to redeem, and advance no other title inconsistent with it, such possession must, *primâ facie* at least, be treated as perfectly reconcilable with, and not adverse to, the title of the mortgagee and the continuation of the lien on the property pledged" (r).

When there is a bond to secure the payment of a sum of money with interest, by which bond also lands are charged (by way of simple mortgage) with the payment of the debt,—a suit to have it declared that the lands are charged with the payment of the debt and for an order for the sale of the lands, as subject to the charge, in satisfaction of the debt, is a suit founded not on the mere contract to pay the debt but upon the hypothecation of the land, and the period of limitation is twelve years running from the origin of the cause of action (s).

(r) *Buldeen v. Musst. Golab Koonwer*, N.W.P. (Agra) H.C. (F.B.) 102. See also *Mankee Koorer v. Sheikh Munnoo*, 14 B.L.R. 315.

(s) *Juneswar Dass v. Mahabeer Singh*, L.R. 3 I.A. 1. Act XIV of 1859, sec. 1, cl. 12. See also *Surwan Hossein v. Shahazadah Golam Mahomed*, 9 W.R. 170 (F.B.); *Gora Chand Dutt v. Lokenath Dutt*, 8 W.R. 334; *Chetti Gaundan v. Sundaram Pillai*, 2 Mad. H.C. 51; *A. Kristna Row v. H. Hachapa Sugapa*, 2 Mad. H.C. 307. As to the difference (as regards limitation) between registered and unregistered instruments and contracts for the payment of money,—see Act XIV of 1859, sec. 1, cls. 9, 10, 11, 16; Act IX of 1871, Sch. 2, Arts. 56, 65, 66, 67, 115, 116, 117; and Act XV of 1877, Sch. II, Arts. 57, 66, 67, 68, 115, 116, 117.

Under Act XIV of 1859, if the person who, but for the law of limitation, would be liable to pay a debt, admitted that such debt or any part of it was due, by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, ran from the date of such admission; but if more than one person were liable, none of them became chargeable by reason only of a written acknowledgment signed by another of them (*t*). An account stated, acknowledged to be correct and signed by an agent, is not an acknowledgment in writing signed by his principal so as to extend the period of limitation (*u*). And a memorandum of payments made, endorsed on the bond and signed by the principal is not sufficient (*v*),—nor is a balance struck and orally acknowledged to be correct (*w*). But it is not necessary that in the acknowledgment a precise sum should be mentioned, or that there should be a promise to pay. All that is required is that there should be a distinct acknowledgment of the claim (*x*).

In suits in Courts established by Royal Charter, by a mortgagee to recover from the mortgagor the possession of the immoveable property mortgaged, the cause of action is, under Act XIV of 1859, to be deemed to have arisen from the latest date on which any portion of the

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(*t*) Act XIV of 1859, sec. 4.

(*u*) *Budooobhoosun Bose v. Enaet Moonshee*, 8 W. R. 1; *Parshotam Manchharam v. Mirza Abdul Latif Khan*, 6 Bom. H.C. (o. c. j.) 67.

(*v*) *Gora Chand Dutt v. Lokenath Dutt*, 8 W.R. 334.

(*w*) *Kunhya Lall v. Bunsee*, N.W.P. (Agra) H.C. (F.B.) 94; *Subbarama v. Eastulu Muttusami*, 3 Mad. H.C. 378.

(*x*) *Gopeekishen Goshamee v. Brindabunchunder Sircar Chowdhry*, 13 Moore's I. A. 37; S.C. 3 B.L.R. (P.C.) 37. See also *Nijamudin v. Mahammadali*, 4 Mad. H.C. 385; *Unicka Kandyib Kunhi Kutti Nair v. Valia Pidigail Kunhamed Kutty Maraccar*, 4 Mad. H.C. 359. See *ante* pp. 354—359.

principal or interest was paid on account of the mortgage debt (y).

Under Act XV of 1877 if any person having a right to institute a suit has, by means of fraud, been kept from the knowledge of such right, or of the title on which it is founded, or when any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit against the person guilty of the fraud or accessory thereto, or against any person claiming through him, otherwise than in good faith and for a valuable consideration, must be computed from the time when the fraud first became known to the person injuriously affected thereby ; or, in the case of the concealed document, when he first had the means of producing it or compelling its production (z). An almost similar provision was contained in the Acts of 1859 and 1871 (a), the only amendment of the law made by the present Act being the introduction of the provision that the document must have been fraudulently concealed from the knowledge of the person who has the right to institute the suit. The words "from him" were not contained in the Acts of 1859 and 1871.

In suits in which the cause of action is founded on fraud, the cause of action is to be deemed to have first arisen at the time when such fraud became first known by the party wronged (b).

The Acts themselves must be referred to for further details regarding limitation in the case of minors, and the like.

If any person without his consent has been dispossessed of immoveable property otherwise than by due course of

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(y) Act XIV of 1859, sec. 6.

(z) Act XV of 1877, sec. 18.

(a) Act XIV of 1859, sec. 9 ; Act IX of 1871, sec. 19.

(b) Act XV of 1877, Sch. II., Art. 95 ; Act IX of 1871, Sch. 2, Art. 95 ; Act XIV of 1859, sec. 10.

law, he or any person claiming through him is, in a suit brought to recover possession of such property, entitled to recover possession thereof notwithstanding any other title that may be set up in such suit, provided, that the suit be commenced within six months from the time of such dispossession. But this does not bar the person from whom such possession has been so recovered, or any other person, from instituting a suit to establish his title to the property and to recover possession of it within the ordinary period of limitation (c).

Under the old law of limitation (d), governing suits instituted before Act XIV of 1859 came into force, the period of limitation ran from the date when the cause of action first arose. If the object of the suit was to set aside a mortgage deed, the cause of action arose on the day the deed was executed, except in cases of fraud, when the plaintiff might have the benefit of the latter part of sec. 14, of Ben. Reg. III of 1793 (e). If the suit were for possession, the twelve years ran from the earliest date on which the plaintiff was entitled to possession, if for money, from the day on which he might first have sued for it. Thus if the terms of the agreement were such that the mortgagee was entitled at once to possession as usufructuary, a suit for possession must be instituted within twelve years from the date of the deed (f). And where the deed stated that possession had

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(c) Act XIV of 1859, sec. 15, repealed and re-enacted by Art. I of 1877 (Specific Relief Act), see secs. 2 & 9.

(d) Ben. Reg. III of 1793, sec. 14: Ben. Reg. II. of 1803; sec. 18. For the old law of limitation in Madras and Bombay, see Mad. Reg. II of 1802, sec. 18, cl. 4 and Bom. Reg. V of 1827, Chap. I.

(e) *Jeonath Bhuggut v. Koopa Koonwur*, 2 W.R. 273 (note).

(f) *Buddinath Paul v. Raja of Burdwan*, S.D.A. 1857, p. 1816. See also *Ubboo v. Suktoo*, S.D.A. N.W.P., 1850, p. 239; *Noor Ahmud v. Suruf-colmisa*, S.D.A. N.W.P., 1851, p. 54; *Punnee Lall v. Indurjeet*, S.D.A. N.W.P., 1852, p. 322; *Insan Rai v. Narain Dass*,

already been given to the mortgagee, who was to hold it for three years, at the end of which time the mortgagor might redeem on payment of the loan with interest, and in default of his doing so, the property was to become the mortgagee's, it was held that the cause of action at once arose on the failure of the mortgagee to obtain the possession agreed upon, and that as he had never been in possession, a suit for possession by him must be brought within twelve years from the date of the deed (g).

Certain mortgaged lands were sold by the Collector for arrears of revenue, while a suit for possession by the mortgagee was pending in the civil courts. The surplus proceeds of the sale were, before the suit for possession was decided, appropriated by the Collector in payment of arrears on other estates belonging to the mortgagor. The mortgagee obtained a decree for possession. Within twelve years from the date of that decree, but more than twelve years from the date of the transfer made by the Collector, the mortgagee brought an action against him for the recovery of the surplus proceeds so transferred. The majority of the Court held that his suit was barred by lapse of time, and would not lie. And no doubt, the mortgagor's allowing the property to be sold for arrears, was such a breach of contract on his part, as gave the mortgagee an immediate right of action for the recovery of his debt (h).

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S.D.A. N.W.P., 1853, p. 100 ; *Mirza Nuwazish Ali Beg v. Nund Lall Dass*, S.D.A. N.W.P., 1853, p. 391 ; *Ram Gholam Rawut v. Ram Uchruj Misr*, S.D.A. N.W.P., 1855, p. 243 ; *Thakoordeen v. Waris Khan*, S.D.A. N.W.P. 1856, p. 72 ; *Lalla Matadeen v. Hookum Singh*, S.D.A. N.W.P. 1860, p. 280 ; *Gunga Sahoo v. Bhookim Misser*, 7 Sel. Rep. 77.

(g) *Gungabishun v. Jogul Kishore*, S.D.A. N.W.P., 1853, p. 550. See also *Ram Gholam Rawut v. Ram Uchruj Misr*, S.D.A. N.W.P., 1855, p. 243.

(h) *The Collector of Midnapore v. Raja Pirteebullub Pall*, S.D.A. 1854, p. 182. See also *supra*, pp. 274, 275 & 306.



A *birt putr* was granted, which was a deed of absolute sale, under which, if it had been unaccompanied by any other document, it would have been necessary to sue for possession within twelve years from the date of execution. But the sale was rendered conditional by means of an *ikrarnamah* executed eight days afterwards, which gave the seller a right to redeem at the end of five years, on repaying the sum advanced to him with interest. The Court decided that the *birt putr* was virtually put in abeyance by the subsequent deed, and that the right of the purchaser under it did not revive until the default of the seller at the end of the five years: that consequently no cause of action arose until the expiration of the five years, and that as a suit for possession within that period could not have been entertained, a suit within twelve years from its expiry was in time. It was further the opinion of the Court that, had the *birt putr* or the *ikrarnamah* contained any stipulation that the purchaser and lender should enter into possession, the date on which he might first have entered would have been the time when his cause of action first arose, within twelve years from which his suit must have been brought (i).

But in calculating the date from which limitation begins to run, care must be taken not to confound the time at which the mortgage debt becomes recoverable, with the time at which some collateral debt, included in the deed, becomes due. Thus, where the mortgagor was to remain in possession at a monthly rent, and in default of payment the mortgagee was to take possession, the mortgagor having failed in his first and all other payments, it was held that the limitation as to the mortgage debt did not

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(i) *Mirza Nuwazish Ali Beg v. Nund Lall Dass*, S.D.A. N.W.P., 1853, p. 391; *Ramchurn v. Ramdehul*, S.D.A. N.W.P., 1854, p. 180; see also *Ram Gholam Rawut v. Ram Uchruj Misr*, S.D.A. N.W.P., 1855, p. 243.

commence on these defaults (j). And when the mortgage debt is repayable by instalments, on default of payment of any one of which the whole becomes due and the mortgagee may foreclose, the mortgagee is not bound to foreclose on the first default but may proceed to foreclose upon a subsequent default,—the previous one notwithstanding (k).

If a debtor makes payments in respect of instalments which are barred by lapse of time, he cannot afterwards say he need not have paid them, and set them off against later instalments which are not barred (l).

A mortgagee who had issued notice of foreclosure was held under the old law of limitation to have a further period of twelve years from the expiry of the year of grace, during which he might sue to have his title declared absolute and to be put in possession; but if he let the twelve years pass without bringing his suit for possession on foreclosure, his right was wholly lost to him (m). And when a mortgage is duly foreclosed, the twelve years within which the mortgagee must sue for possession run from the date of final foreclosure, whether the mortgage was foreclosed on the earliest possible day or not (n).

This point was very fully discussed in the recent case

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(j) *Ubboo v. Suktoo*, S.D.A. N.W.P., 1850, p. 239.

(k) *Buldeen v. Musst. Golab Koonwer*, N.W.P. (Agra) H. C. (F.B.) 102; *Mankee Koor v. Sheikh Munnoo*, 14 B. L. R. 315. See Act IX of 1871, sec. 23.

(l) *Munnee Ram v. Mussumat Sona*, S.D.A. N.W.P., 1853, p. 361; *Mirza Shahir Yar Bukht v. Nuwab Muhboob Ulee Khan*, S.D.A. N.W.P., 1854, p. 477.

(m) *Lopes v. Chowdree Bheem Sing*, 7 Sel. Rep. 45; *Buddinath Paul v. Raja of Burdwan*, S.D.A. 1857, p. 1816; *Nilambur Majoondar v. Parbutteechurn Majoondar*, S.D.A. 1859, p. 1494. See also *Roy Rammohun v. Bhugwan Dass*, S.D.A. 1856, p. 817.

(n) *Buldeen v. Musst. Golab Koonwer*, N.W.P. (Agra) H. C. (F.B.) 102. See also *Denonath Gangooly v. Nursing Proshad Dass*, 14 B. L. R., 87. And see ante pp. 403, 404.

of *Burmamoye Dasse v. Dinobundhoo Ghose* (o) which was, however, one governed by Act IX of 1871. In that suit the mortgage bond was dated the 11th June 1858. Default having been made the following year, the mortgagee applied under Ben. Reg. XVII of 1806 for foreclosure, and an order was made by the Court in October 1866 to foreclose the mortgage upon the expiry of the year of grace in the October following. The mortgagee instituted his suit for possession on the 10th April 1878, and the defendant contended that it was barred by limitation as the period should be reckoned from the date of the default and not from the expiry of the year of grace. The Court, however, following the rulings in *Ghinaram Dobey v. Ram Monaruth Ram Dobey* (p), and *Jeora Khun Singh v. Hookum Singh* (q), held that the suit was not barred as the period of limitation was to be computed from the expiry of the year of grace.

A number of cases were cited during the hearing of the case, and they are very fully commented on in the judgment of the Court, but it will be sufficient here to state that the ground the Court went upon was that the period of limitation was to be computed from the time when the mortgagor's possession became adverse to the mortgagee. Upon this point in the case of *Ghinaram Dobey v. Ram Monaruth Ram Dobey* (r), *Pontifex, J.*, remarked : "Now it cannot be said, we think, that after such proceedings (foreclosure proceedings) he was only entitled to the time allowed by Art. 135 of the Limitation Act (s) as

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(o) I. L. R. 6 Calc., 564.

(p) I. L. R. 6 Calc., 566, note ; S.C. 7 C.L.R., 580.

(q) 5 N.W.P. (Agra) H.C., 358.

(r) I. L. R. 6 Calc., 566 (note.)

(s) Act IX of 1871 ; but compare Act XV of 1877, Art. 135, in which the period is to be computed from the time when the mortgagor's right to possession determines. See *ante*, pp. 413, 414.

mortgagee. The very fact of his taking foreclosure proceedings changes his interests as mortgagee to that of absolute owner, and as he brought his suit within twelve years from the date of such change of character, we think he is no longer bound by that Art. (135). By Art. 145 (t) he would be entitled to sue within twelve years after possession became adverse to him. It cannot, we think, be said, that as long as the relation of mortgagor and mortgagee subsisted, the possession of the mortgagor could be adverse to the mortgagee. For the time, therefore, he was entitled to take possession as mortgagee, and up to the time that the year of grace expired, possession was not adverse to him; but directly the foreclosure became complete, possession became adverse."

Their Lordships of the Privy Council have remarked that "it cannot be laid down as a rule universally true, that under Reg. III of 1793, sec. 14, a mortgagee's proceeding for a foreclosure under a mortgage of the class of *bye-bil-wufa* simply, cannot be preferred after twelve years from the expiration of the time which the instrument fixes as the period of redemption by payment, and on the expiration of which the conditional sale will become absolute: for this indiscriminating ground of decision would include alike adverse occupations and those which had not the semblance even of such a character, and would establish a bar arising from simple occupation and not from the laches of the defendant or of others before him" (u). And again they say: "As no difference between the law prevalent in India and the law prevalent here, as to the relation between mortgagor and mortgagee on this point, has been suggested, the possession of those who claim under the mortgagor,

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(t) Act IX of 1871.

(u) *Prannath Roy Chowdry v. Rookea Begum*, 7 Moore's I. A. 323; S.C. 4 W.R. (P.C. 37.

so long as they assert a title to redeem, and advance no other title inconsistent with it, must, *prima facie* at least, be treated as perfectly reconcilable with, and not adverse to the title of the mortgagee and the continuation of his lien on the thing pledged. It is by no means the essence of such a title there, any more than it is here, that it should be accompanied by an actual continuing possession of the lands. The pledgee may from various causes be reluctant to assume possession of the pledge, or to shorten the period of its redeemable quality."

In certain cases, undisturbed possession for twelve years gave a good title under the old law, without reference to the time when the plaintiff's cause of action arose. In the case of *Rajah Enayet Hossein v. Sayud Ahmed Reza* (v) the Privy Council said that the object of Ben. Regs. III of 1793, sec. 14, and II of 1805, sec. 3, cls. 1, 2, and 3, "appears to be to protect the title of parties who have been in possession under a *bond fide* title, or what is supposed to be a *bond fide* title, for the period of twelve years. But certain exceptions are introduced into those Regulations,—amongst others that the limitation of twelve years is not to apply where the party has been precluded by good and sufficient cause from bringing his suit within the period. Neither is it to apply, if the original possession obtained by the party in possession has been obtained unjustly: and the Regulations are not to apply to cases where the property had so come into the hands of other persons from whom the parties in possession may have derived their title, and shall not have been subsequently held under a just and honest title."

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(v) 7 Moore's I.A. 238. See also *Sheikh Imdad Ali v. Mussumat Kootby Begum*, 3 Moore's I. A. 1; S.C. 6 W.R. (P.C.) 24; *Gunga Gobind Mundul v. The Collector of the Twenty-four Pergunnahs*, 11 Moore's I. A. 345; S.C. 7 W.R. (P.C.) 21; and see *Huro Chunder Biswas v. Nobo Kissen Mookerjee*, W.R. 1864, p. 159.

But it is only a really *bonâ fide* possession of twelve years that will give a title under the old law; and when the title has been throughout disputed and litigated, the possession, even though undisturbed, is not a *bonâ fide* quiet possession which will give any title. *A*'s title accrued in 1813, but a suit which he brought in order to establish it, was not finally decided by the Privy Council till 1842. It was held that as it was impracticable for *A* to sue for possession until the question raised in his first suit was decided by the Privy Council, a suit for possession brought within twelve years from the date of the decree in 1842, was not barred: and that the possession of the other party under a *foujdary* order of a Magistrate, although extending over much more than twelve years, was no *bonâ fide* possession such as barred *A*'s right (*w*).

Certain property being under mortgage, the right, title and interest of the mortgagor were attached and sold in execution of a decree, and the purchaser was put in possession of the property. The mortgagee subsequently got a decree for foreclosure in the Supreme Court, but did not make the purchaser a party. Within twelve years from the date of the decree of foreclosure, but more than twelve years after the purchaser got possession, the mortgagee brought a suit for possession, making the purchaser a defendant. The suit was held to be barred (*x*).

The right and title of *A* in an estate were sold in execution of a decree. *B* was declared the purchaser and was put in possession, having no notice of the existence of a

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(*w*) *Rajah Enayet Hossein v. Sayud Ahmed Reza*, 7 Moore's I.A. 238. See also *Mooktokashy v. Raneek Lukhee*, 1 Hay 306; *Firingee Sahoo v. Sham Manjhee*, 8 W.R. 373.

(*x*) *Dabee Koomar Bose v. Roy Bykuntnath Chowdree*, S.D.A., 1853, p. 210. See also *Baboo Sheosukhye v. Baboo Bunead Singh*, S.D.A., 1853, p. 21; *Punchanun Bose v. Roy Bykuntnath Chowdree*, S.D.A., 1853, p. 546.

mortgage in favor of *C*. After *B* had been in possession for more than twelve years, *C* brought a suit (under the old law) against him to recover possession. The Privy Council held that, under the circumstances, the possession of *B* was in no way as mortgagor or under the mortgagor, but as owner, and was adverse to the title of the mortgagee: and that it was necessary that a suit by the mortgagee to disturb the possession of such a purchaser should have been brought within twelve years. In this case no proceedings with a view to foreclose the mortgage had, within the twelve years, been taken against the purchaser (*y*).

In 1823 the trustees of a marriage settlement invested the trust funds in the mortgage of a house and premises in the neighbourhood of Calcutta. The mortgagor was the first tenant for life under the settlement, and it was agreed that he should be entitled to remain in the house as long as he pleased, the rent of the premises being set off against the income of the trust funds to which he was entitled under the settlement. In execution of a money decree against the mortgagor his right, title and interest in the premises were purchased in 1866 by the judgment-creditor, a lady, who at the time of the execution and sale lived in the mortgagor's house. After the purchase all parties continued to live in the house as before. The mortgagor died on the 14th August 1867 and on the 13th of August 1879 the present suit for sale or foreclosure was brought by the plaintiff in whom the legal and beneficial interest in the trust funds had become vested. On limitation being pleaded the Court held that the position of the judgment-creditor under the sale of 1866 was not adverse to the plaintiff or those under whom he claimed; that the suit was not barred by limitation; and that the plaintiff was entitled to a decree for

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(y) *Anundo Moyee Dossee v. Dhonendro Chunder Mookerjee*, 14 Moore's I.A. 101; S.C. 8 B. L. R. 122.



sale (z). It was contended in this case that, inasmuch as the purchaser after the sale in 1866 was alone in possession as owner (the mortgagor with her permission being allowed to remain in the house) and being a judgment-creditor, her possession at once became adverse to the trustees, and the case came within the decision of the Privy Council in *Anundo Moyee Dossee v. Dhonendro Chunder Mookerjee* (a), but upon this contention the Court remarked : in that case "the Privy Council seem to have laid down that, when by an act of law there has been an alienation from a mortgagor to a third person, the limitation law applicable between mortgagor and mortgagee ceases to apply, and the ordinary limitation thenceforward applies. That seems to have been decided under the Limitation Act of 1859. Whatever may have been the principle on which that case was decided, it is sufficient to say that it does not apply here, because (even if the property was not impressed with a trust) the tenant for life under the deed was entitled to possession of the house during his life, and having been in ostensible possession until the time of his death, there was nothing to show that the property had passed to a stranger, and we are of opinion that limitation, at all events, would not run until the death of the tenant for life, and that would be within twelve years of the institution of this suit."

*A* fraudulently obtained possession, and *B* afterwards purchased the property at an execution sale under a decree against *A*. More than twelve years after the dispossession by *A*, but less than twelve years after the purchase by *B*, a suit for possession was brought against the latter by *C*. It was held that *C*'s right of action was not barred, *B* not having possessed under a *bond fide* title for twelve years (b).

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(z) *Manly v. Patterson*, I. L. R. 7 Calc. 394.

(a) 14 Moore's I.A. 101; S.C. 8 B.L.R. 122.

(b) *Jodha Singh v. Hurchund Singh*, S.D.A. N.W.P., 1854, p. 391.

Possession obtained by a mortgagee under his mortgage is not a *bonâ fide* possession, or such as can convey a permanent title (c.) "Under the Regulation, an adverse title must also be a *bonâ fide* title under the shorter period of limitation: and as neither mortgagor nor mortgagee can in ordinary cases be unconscious of the conditional nature of their own titles, there is no ground for presuming generally, between the immediate parties, adverse title from mere length of possession" (d).

Under Act XV of 1877, sec. 28, on the termination of the period limited to any person for instituting a suit for possession of any property (e) his right to such property is extinguished. The effect of this is, that, after the prescribed period of limitation has passed, an absolute interest in the property exists in the party who has been in possession during that period. The corresponding section of Act IX of 1871 (f) was limited to suits for possession of "any land or hereditary office."

There was no corresponding provision in Act XIV of 1859, but it was held by the Privy Council under that Act that a twelve years' adverse possession of land not only barred the remedy of the rightful owner, but extinguished his right (g).

(c) *Rambhujun Patuck v. Goor Suhae*, S.D.A. N.W.P., 1854, p. 425. See also *Petition No. 314 of 1856*, S.D.A., 1857, p. 121.

(d) *Prannath Roy Chowdry v. Rookea Begum*, 7 Moore's I.A. 323; S.C. 4 W.R. (P.C.) 37; *Musst. Ameerun v. Musst. Hyatun*, S.D.A., 1860, vol. 1, p. 443. See also *Vanneri Purushottaman Nambudri v. Patanattil Kunju Menavan*, 2 Mad. H.C. 382; and *ante* p. 431.

(e) As to what is included in "property" see the remarks of Garth, C.J., in *Ram Chunder Ghosaul v. Juggutmonmohiney Dabee*, I.L.R. 4 Calc. 283 (*cf.* p. 297).

(f) Sec. 29.

(g) *Gunga Gobind Mundul v. The Collector of the 24-Pergunnahs* 7 W.R. (P.C.) 21; S.C. 11 Moore's I.A. 345.

A suit is instituted in ordinary cases when the plaint is presented to the proper officer, and its return for amendment and subsequent presentation and acceptance by the Court will not constitute a fresh institution of the suit. So where the plaint in a suit for money charged upon immoveable property, which described such property as the defendant's "one biswa five bis-wansi share within the jurisdiction of the Court" was presented on the 21st November 1878, within the period of limitation prescribed for such a suit by Act XV of 1877, and it was subsequently returned for amendment, and, having been amended by the insertion of the words "in mouzah S parganna S" after the word "share" was presented again on the 8th January 1879, after such period, it was held that the date of the amendment of the plaint did not affect the question of limitation for the institution of the suit (*h*).

The law of limitation must always be strictly applied. But if the period of limitation prescribed for a suit expires on a day when the Court is closed, the suit may be instituted on the day the Court re-opens (*i*).

A suit brought by a mortgagee to recover from the mortgagor personally the amount due to him, must be brought in a Court within the limits of whose jurisdiction the cause of action arose, or the defendant at the time of the commencement of the suit resides or works for gain, &c. (*j*). If the suit be for possession of the property mortgaged, the rules as to the Court in which it is to be instituted are the same as those which apply in the case of redemption suits (*k*).

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(*h*) *Ram Lal v. Harrison*, I.L.R. 2 All. 832.

(*i*) Act XV of 1877, sec. 5 ; Act IX of 1871, sec. 5a.

(*j*) Act VIII of 1859, sec. 5 ; Acts X of 1877 and XIV of 1882, sec. 17.

(*k*) *Supra*, pp. 374, 375. Act VIII of 1859, secs. 5—14. Acts X of 1877 and XIV of 1882, sec. 16, &c.

A suit on a simple mortgage, to ascertain the amount of the debt and have it declared a charge on the land, and for a decree for sale was held, so far as it affected the land, to be a suit for land within the meaning of sec. 5 of Act VIII of 1859 (l). Thus the mortgaged land being in the district of Z, but the mortgagor not being personally liable to the jurisdiction of the Court of that district, it was held that a suit to have the land declared liable to the charge, and for sale, was well brought in the District Court of Z. But that Court could not give a decree against the mortgagor *personally* for the mortgage debt (m).

A suit was instituted in the Court of the Subordinate Judge of Benares for money secured by the mortgage of immoveable property situate within the limits of the Benares Court and of immoveable property situate within the limits of the family domains of the Maharajah of Benares. The Subordinate Judge, not having jurisdiction to proceed with the suit, so far as it related to the latter property, obtained the necessary authority to proceed under the provisions of sec. 13 of Act VIII of 1859 from the High Court in concurrence with the Board of Revenue. He then proceeded with the suit, and, on the 18th November 1874, gave the plaintiffs a decree for the recovery of the money claimed by the sale of the mortgaged property. With a view to bring the mortgaged property situate within the limits of the family domains of the Maharajah to sale, this decree was sent for execution to the Subordinate Judge at Kondh, within whose jurisdiction such property was situate; and such pro-

(l) Compare Act XIV of 1882, sec. 16.

(m) *In the matter of the Petition of S. J. Leslie*, 9 B.L.R. 171; S.C. 18 W.R. 269. So also *Musst. Ahmedes Begum v. Dabee Persaud*, 18 W.R. 287; *Mahomed Khuleel v. Mussamat Sona Koor*, 23 W.R. 123; and *Buldeo Doss v. Mussamat Mool Koor*, 2 N.W.P. (All.) H.C. 19. See contra, *Yenkoba Balshet Kasar v. Rambhaji valad Arjun*, 9 Bom. H.C. 12. See *infra* p. 474.

perty was sold on the 29th August and the 4th September 1877. Subsequently the defendants, who held money decrees against *H*, one of the plaintiffs in the above suit, applied to the Subordinate Judge of Benares for the attachment and sale of *H*'s interest in the decree abovementioned, falsely representing that the sales of the 29th August and 4th September had been set aside. *H*'s interest was accordingly put up for sale on the 29th May 1878 at Benares, by the Subordinate Judge of Benares, and was purchased by certain persons, who were induced to purchase by such false representations. The latter then instituted a suit against the defendants to have the sale of the 29th May 1878 set aside, and to recover their purchase money on this among other grounds, that the interest of *H*, being of the nature of immoveable property situate within the limits of the family domains of the Maharajah of Benares, could not legally be sold at Benares by the Benares Court. Upon this latter contention the High Court held that the Benares Court acted *ultra vires* in selling at Benares an interest in immoveable property situate within the family domains of the Maharajah of Benares, and also that the provisions of sec. 13 of Act VIII of 1859 were not applicable in a case in which a portion of the immoveable property was situate within the limits of those domains, as they did not constitute a district within the meaning of that section (n).

But where a decree was obtained in the Court of the Subordinate Judge of the district of Backergunge on a mortgage of a single revenue-paying estate, part of which lay within that district and part within the district of Furreedpore, it was held by the Calcutta High Court, with reference to sec. 19 of Act X of 1877, that the Court which passed the decree was competent to order a sale of the whole

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(n) *Raghu Nath Das v. Kakhan Mal*, I.L.R. 3 All. 568.

of the mortgaged property, though only a portion of it was situated in the district of Backergunge (o).

The Calcutta High Court, in the exercise of its Ordinary Original Civil Jurisdiction, can entertain a suit for land situated either wholly or in part within the local limits of the original jurisdiction. But if only part of the land is within the local limits, the leave of the Court must be obtained at the time the plaint is presented (p). And where there is a mortgage of lands, some of which lie in the town of Calcutta and some in the Mofussil, a suit for an account and foreclosure of the whole will lie in Calcutta, leave to file the plaint having been obtained from the Court at the time it was presented (q).

A suit for possession, by the holder of a zur-i-peshgee lease, or a suit to cancel such a lease, must be an ordinary regular suit and not one under the special rent-law (r).

A suit for money chargeable upon immoveable property, in which the sum claimed did not exceed Rs. 1,000, although the value of the immoveable property did exceed that sum, was held by the High Court of the North-Western Provinces to be cognizable by a Munsiff, such property being situate within the local limits of his jurisdiction (s).

In Madras it has been ruled that, for the purposes of jurisdiction, the subject-matter of a suit to establish the validity of a charge upon property is, when the value of the

(o) *Shurroop Chunder Goocho v. Ameerrunnissa Khatoon*, I.L.R. 8 Calc. 703.

(p) Sec. 12 of the High Court's Letters Patent of 1865. See *S. M. Jagadamba Dasi v. S. M. Padmamani Dasi*, 6 B.L.R. 686.

(q) *The Bank of Hindustan, China and Japan v. Nundololl Sen*, 11 B.L.R. 301.

(r) *Hurdee Narain Sahoo v. Mussamut Bebee Fatima*, 8 W.R. 301 ; *Rutton Singh v. Greedharee Lall*, 8 W.R. 310. See also *Mahomed Ali v. Batook Dao Narain Singh*, 1 W.R. 52.

(s) *Janki Das v. Badri Nath*, I.L.R. 2 All. 698.

property is in excess of the charge, the amount of the charge; when the charge is in excess of the property, the value of the property (*t*).

It has been held that when land is mortgaged to two persons jointly, to secure a sum advanced by them in equal proportions, a suit by one for his share of the money will lie, although he does not make his co-mortgagee a party to the suit (*u*). And where one of two joint mortgagees (by way of simple mortgage) sued for his moiety of the debt, and got a decree for it, and in execution attached and sold the mortgaged property,—it was held that the other mortgagee might sue for *his* moiety and have the lands sold a second time in execution of *his* decree, unless the purchaser at the first sale chose to redeem. In this last case, the purchaser took with notice of the claim of the other mortgagee (*v*). This decision, however, cannot safely be followed. There is no doubt that, as a general rule, if the mortgagees are joint, and there is in the mortgage contract no express severance of their interests, the suit for the recovery of the money due upon the mortgage must comprise the interest of all the mortgagees, and they must be parties to the suit either as plaintiffs or as defendants (*w*).

Thus where the whole of a mortgage debt was due to the persons claiming under the mortgage jointly and not severally, and a person, entitled only to one moiety of the debt, foreclosed the mortgage as to that moiety, and sued the different mortgagors for possession of a moiety of their interests in the mortgaged property, in virtue of the mortgage and foreclosure, it was held by the Allahabad High

(*t*) *Krishnama Chariar v. Srinivasa Ayyangar*, I.L.R. 4 Mad. 339.

(*u*) *Ramruttun v. Ummed Hoossein Khan*, S.D.A. N.W.P., 1853, p. 91.

(*v*) *Indurjeet Koonwur v. Brij Bilas Lal*, 3 W.R. 130.

(*w*) Compare the Transfer of Property Act, 1882, sec. 67, cl. (*d*) and sec. 85.



Court that the foreclosure was invalid and the suits were not maintainable (x).

It would appear from a decision of the Allahabad Court that, when a mortgage of an estate is a joint one, and there is no specification in it that any individual share or portion of a share of such estate is charged with the repayment of any defined proportion of the mortgage money, but the whole estate is made responsible for the mortgage money, foreclosure proceedings to which all the mortgagors are not parties are irregular, and that it is not competent for the mortgagee to treat a sum paid by one of the mortgagors as made on such mortgagor's own account in respect of what might be calculated as his reasonable share of the joint debt and to release his share from further liability. When, therefore, in the case of such a mortgage the mortgagee in taking foreclosure proceedings exempted the person and share of the mortgagor so paying and proceeded only against the other mortgagors, and the mortgage having been foreclosed, sued the other mortgagor, for the possession of their shares of such estate, it was held that, as the foreclosure proceedings were irregular the suit was not maintainable (y).

But where the mortgagor sold the equity of redemption of one portion of the mortgaged property to the mortgagees, and of the rest to third parties, it was held by the same Court that the mortgage was split up; that in respect of the portion of the property purchased by the mortgagees merged in their purchase, while that in respect of the rest of the property remained a debt redeemable by the purchasers at a proportionate valuation, and in consequence one which the mortgagees could foreclose on similar terms, and

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(x) *Bishan Dial v. Manni Ram*, I.L.R. 1 All. 297. See also *Bhora Roy v. Abilack Roy*, 10 W.R. 476. For circumstances justifying an exception to the rule see *Hunoomanpersaud Sahoo v. Kaleepersaud Sahoo*, W.R. 1864 p. 285.

(y) *Chandika Singh v. Pohkar Singh*, I.L.R. 2 All. 906.

therefore that a suit for possession of that portion of the property of the mortgagees, who had foreclosed the mortgage in respect of it for a proportionate amount of the mortgage money, was maintainable (z).

Where there was a large body of co-sharers in an estate, which had fallen into arrears and was about to be sold by Government, and certain persons saved it from sale, by advancing the sum required, in return for which they got a conditional sale of the property executed by thirty-nine sharers, it was held that as this sale had been for many years recognised by the whole body of sharers, the mortgagees were entitled to foreclose the mortgage against the whole body, although it appeared that four or five sharers were not in any way parties to the execution of the original deed of mortgage (a).

Where, however, two out of certain co-sharers of a patni talook executed a mortgage bond with the object of paying off a quota of the rent due on the estate, and the mortgagee sued all the co-sharers on the bond, it was held that the liability under the bond only extended to the co-sharers who actually signed the document, and to such other co-sharers as, by their presence at the time when the bond was executed, might impliedly be considered to have acquiesced in such execution (b).

It is only in mortgages by hye-bil-wufa, kut-kubala, or conditional sale, that foreclosure can occur (c).

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(z) *Bisheshar Singh v. Laik Singh*, I.L.R. 5 All. 257.

(a) *Sheogovindpershad Singh v. Ramchurun Doobe*, S.D.A. N.W.P., 1854, p. 133.

(b) *Mohesh Chunder Banerjee v. Ram Pursono Chowdry*, I.L.R. 4 Calc. 539.

(c) This statement has been called misleading by the late learned Chief Justice of the Allahabad High Court (*Sir Robert Stuart*). See his remarks in *Gopal Pandey v. Parsotam Das*, I.L.R. 5 All. 121 (cf. p. 126) (F.B.). It must, however, be read in connection with chap. II.

In pure usufructuary mortgages, including those by lease, nothing more than a temporary enjoyment of the land is given to the mortgagee, liable to be put an end to at any moment (unless the mortgagor is barred under the Limitation Acts of 1859, 1871 or 1877), on the mortgage debt being cleared off (*d*). In simple mortgages, and in mortgages by *bye-bil-wufa*, *kut-kubala* or conditional sale, whether accompanied by possession and usufruct or not, the mortgagor may, if he make default, be deprived of his whole interest in the property he has pledged. In the former case, the rights of the mortgagor are, under a decree of Court, put up for sale, and transferred to whomsoever may be declared the purchaser: in the latter, foreclosure takes place, that is to say, all the interest of the mortgagor in the mortgaged lands ceases, and passes directly from him to the mortgagee.

Though an usufructuary mortgagee, who has not hypothecated the property as security for the mortgage money, cannot, even where the mortgagor has failed to deliver possession of the mortgaged property in accordance with the terms of the mortgage, sue the mortgagor to receive the principal money and interest by enforcement of the lien, still, when such a suit was brought, the Court, holding that it was inequitable to dismiss it for this reason, treated it as one for compensation for the breach of the contract of mortgage of which the defendant had been guilty and gave the plaintiff a decree for the principal

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from which it will appear that the learned author of this treatise only professed to treat of the forms of mortgage in common use. Of these the only one in the case of which foreclosure can occur is the mortgage by conditional sale. No doubt, as stated by *Sir R. Stuart*, "foreclosure may take place, if the terms of the contract admit of that remedy," whatever the *name* of the mortgage may be.

(*d*) See *Lalchund Shaha v. Ummut-ul-khyr Beebee*, S.D.A., 1859, p. 382.

mortgage money with interest at the rate specified in the contract of mortgage, which it considered might fairly be taken as a reasonable guide in estimating the amount of damages to be decreed (e).

The mortgagee is bound by the terms of his contract, and cannot sue to foreclose, or to have his debt paid or the land sold in satisfaction of it, until the time fixed by the contract for the repayment of the loan has passed (f).

There was a *zur-i-peshgee* lease for ten years at a certain fixed *jumma*, with an express contract by the mortgagor to repay the principal on a day named : and the lease provided that the mortgagee should out of the fixed *jumma* retain a certain sum annually by way of interest and Government revenue, and should pay to the mortgagor the residue of the *jumma*. It was also agreed that if the income of the property improved through the agency of the mortgagee, the mortgagor should have no claim to it : that the security should remain in force till the date of payment : and that meanwhile the mortgagor would not sell or mortgage the property. It was held that, after the period fixed for payment had passed, the mortgagee had a right to sue the mortgagor personally for the amount due and to have the property sold in satisfaction,—and further, that, as the mortgage was entered into subsequent to the repeal of the usury laws, the mortgagee was not bound to account for receipts from the property in excess of the annual *jumma* named in the lease (g).

By means of a deed of conditional sale dated the 14th May 1874 *A* mortgaged to *B* for a sum of Rs. 2,000

(e) *Mahesh Singh v. Chauharja Singh*, I.L.R. 4 All. 245. See also *Sheo Narain v. Jai Gobind*, I.L.R. 4 All. 281. See also *supra* p. 306.

(f) See *Koonjbeharee Sookul v. Kishen Kishore Skome*, S.D.A., 1854, p. 507.

(g) *Munnoc Lal v. Baboo Reet Bhoobun Singh*, 6 W.R., 283.

certain land for a term of seven years. Amongst other provisions the mortgage deed contained the following—(iii) that *A* should retain possession of the property paying interest at 12 per cent. and should repay the principal within seven years and then get the property redeemed and the mortgage deed returned : (iv) that if in any year *A* failed to pay the interest, then the principal sum and the remaining interest should become the sale consideration and the term fixed should be cancelled and the mortgage deed should be deemed a sale-deed ; (v) that if *A* failed to repay the principal within seven years, then after the expiry of that term the mortgage deed should become an absolute sale deed, and the mortgage consideration the sale consideration, to which neither *A* nor his heirs should have any claim. On the 23rd April 1877 default having been made in the payment of interest annually as stipulated, and the term of seven years not having expired, *B* took proceedings to foreclose in pursuance of the conditions contained in the fourth clause of the deed, and on the 13th July 1878 the year of grace having expired the conditional sale was declared absolute. *B* then sued for possession of the property, but it was held that the fifth clause of the deed did not dispense with the necessity of complying with the provisions of sec. 8 of Ben. Reg. XVII of 1806 and was compatible with them ; that on and after the expiry of the stipulated period application for the foreclosure of the mortgage and rendering the conditional sale absolute might and must be made ; that the provisions contained in the fourth clause in effect defeated and violated the provisions of that Regulation and summarily converted a conditional sale into an absolute sale in disregard and defiance thereof and that the foreclosure proceedings taken by *B* before the expiry of the period stipulated for the repayment of the principal sum lent were irregular and that the sale could only be

rendered conclusive in the manner prescribed by that Regulation in pursuance of the fifth clause of the deed. The suit was accordingly dismissed (h).

The decision in the above case was approved and followed in the case of *Piari v. Khiali Ram* (i). There the mortgagee had two remedies in respect of the mortgagor's breach to pay the stipulated interest at the time fixed by the mortgage deed, one being a suit on foreclosure proceedings to convert the mortgage into a sale and the other a suit to recover his money against his debtor by enforcement of his lien against the mortgaged property. He chose the former omitting the latter, and his suit was held to have been rightly dismissed on the ground that he was not entitled to such remedy until the expiration of the mortgage term. He afterwards, however, brought a second suit to enforce his lien against the property, and though it was contended that he should have included that claim in the former suit and not having done so it was barred under sec. 43 of Act X of 1877, it was held, that, inasmuch as at the time he brought his suit after the foreclosure proceedings he was not a person entitled to more than one remedy, not being entitled to the one he then asked for, that section had no application and consequently he was held entitled to the relief he sought in his second suit.

It has been held by a Judge (*Norris, J.*) of the Calcutta Court, exercising Original Civil Jurisdiction, that a suit for foreclosure or sale is one to obtain "relief respecting immovable property" within the meaning of sec. 77 of the Code of Civil Procedure (Act XIV of 1882), and therefore that the

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(h) *Imdad Husain v. Mannu Lal*, I.L.R. 3 All. 509. See also *Srimati Sarasibala Debi v. Nand Lal Sen*, 5 B.L.R. 389. See contra *Prosaddoss Dutt v. Ramdhone Mullick*, 1 Ind. Jur. (1866) 255; and *Buldeen v. Musst. Golab Koonwer*, N.W.P. (Agra) H.C. (F.B.) 102.

(i) I.L.R. 3 All. 857.

service of the summons upon a duly constituted agent of one of the mortgagees, who was at the time of service in charge of the mortgaged property, was sufficient (j).

I. In a case of *simple mortgage* (k), the mortgagee may bring his suit at any time (except where the ordinary limitation rules intervene) after the debt has become due according to the terms of the agreement: and no notice of the intention to sue need be given to the mortgagor, more than is required to be given to the defendant in any ordinary suit.

The suit is brought for the recovery of the sum lent, with interest and costs, and for a declaration of the mortgagee's lien on the land. And it has been held by the Bombay High Court that where there is no stipulation that the payment of the principal money shall be deferred for any specified time but the principal of the mortgage debt is payable on demand, the mortgagee ought not to sue for interest only, but for an account and payment of what remains due on the mortgage for principal and interest up to the filing of the plaint (l).

In a case which came before the Allahabad Court certain immoveable property was mortgaged to the plaintiff, and then sold to *N*. It was then brought to sale in execution of a decree against *N*, and was purchased by *H*. The balance of the sale proceeds after satisfaction of that decree was paid to *N*. Under the terms of the mortgage interest on the principal amount was payable annually, and its payment was charged on the property as well as the payment of the principal amount. The mortgagors having failed to pay the interest annually, the plaintiff, in 1875, sued them and *N* and *H* to recover the interest due. It was

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(j) *Michael v. Ameena Bibi*, I.L.R. 9 Calc. 733.

(k) For the remedies of the mortgagee in this class of mortgage under the Transfer of Property Act, 1882, see secs. 67 and 88 to 90 of that Act.

(l) *Annappa v. Ganpati*, I.L.R. 5 Bom. 181.



decided in that suit that *N* was primarily and personally liable for the interest then due on the mortgage, as he had received the sale proceeds of the property, and the property was only liable in case he failed to satisfy the claim. *N* subsequently paid into Court the sale proceeds he had received and the plaintiff was paid the same. In 1878 the plaintiff again sued the same persons for interest and again *N* was declared primarily and personally liable, on the ground that he had not at once made over the sale proceeds to the plaintiff. In 1880 the plaintiff sued the same persons to recover the principal amount and interest due on the mortgage by the sale of the mortgaged property. It was held that whatever might have been the rights and relations of the parties so long as any portion of the sale proceeds remained with *N*, their position towards him assumed an entirely different character when once he had discharged himself of these moneys, and with this change in the situation the *ratio decidendi* of the suits of 1875 and 1878 no longer existed, and therefore the decisions in those suits did not preclude the plaintiff from bringing a suit to recover the principal and interest due on his mortgage from the mortgaged property (*m*).

If the property is in the possession of third parties who claim it as purchasers, or otherwise in a manner adverse to the mortgagee, they should be made defendants, so that the claims of all who have, or assert an interest in the matter, may be disposed of in one suit (*n*). And if there be persons not parties to the suit claiming an interest in the property, no form of dealing with the property in their absence can prejudice their rights (*o*).

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(*m*) *Ratan Rai v. Hanuman Das*, I.L.R. 5 All. 118.

(*n*) *Annundo Moyee Dossee v. Dhonendro Chunder Mookerjee*, 14 Moore's I.A. 101 ; S.C. 8 B.L.R. 122.

(*o*) *Syud Emam Momtazooddeen Mahomed v. Rajcoomar Dass*, 14 B.L.R. 408 (F.B.) (*cf.* pp. 429, 440, and 441.)

This point was very clearly laid down by the Madras High Court in a case (*p*) in which it was contended that a first mortgagee was not bound to make a second mortgagee a party to his suit on his mortgage, and that a sale made in execution of a decree obtained in that suit was binding on the second mortgagee notwithstanding that he had not been made a party to the suit, and certain authorities (*q*) were quoted in support of this contention. The Court said (*r*) : " A consideration of the nature and incidents of a mortgage leads us to the conclusion that the rulings opposed to the rulings and dictum cited are the more sound. The effect of a mortgage is to transfer to the mortgagee a portion, more or less extensive according to the nature of the mortgage, of the rights of the mortgagor. \* \* \* Where the mortgagor has transferred in whole or in part such interest (*i.e.*, the interest remaining in him) the transferee acquires against the mortgagee similar rights to those possessed by the mortgagor, so far as they are necessary for the enjoyment and preservation of the interest transferred to him. If the mortgagee desires to foreclose the mortgagor, or to bring the property to sale, a purchaser from the mortgagee or a second mortgagee is entitled to redeem the first mortgage and thus to protect his own interest in the property mortgaged. Hence it has been held that to render a decree for foreclosure or sale effectual, the mortgagee must make subsequent purchasers or incumbrancers parties to the suit, at least if he have notice of them or circumstances exist which

(*p*) *Venkata v. Kannam*, I.L.R. 5 Mad. 184 ; see also *Venkata-narsammah v. Ramiah*, I.L.R. 2 Mad. 108 (*cf.* p. 111) ; and *Timmu v. Deva Rai*, I.L.R. 5 Mad. 265.

(*q*) Ruling in *Muthora Nath Pal v. Chundermoney Dabia*, I.L.R. 4 Calc. 817 ; and dictum of *West, J.*, in *S. B. Shringapure v. S. B. Pethe*, I.L.R. 2 Bom. 662.

(*r*) *Venkata v. Kannam*, I.L.R. 5 Mad. 184 (*cf.* pp. 186—187.)

should have put him on inquiry as to the claim by them of an interest in the mortgaged property. In *Brojonath Koondoo Chowdry v. Khebut Chunder Ghose* (s) it was held by the Judicial Committee that a purchaser from a mortgagor of property in the Mofussil was not bound by foreclosure proceedings to which he had not been made a party."

In the case before it the Court held that a puisne mortgagee who was in possession of the land in question was entitled to ask that a suit to eject him, brought by the assignee of the purchaser of the land which had been sold in execution of a mortgage decree obtained by a first mortgagee in a suit against the mortgagor alone, should be dismissed, but as he had not taken exception to the decree, which ordered him to pay the amount realized at the Court sale within a certain time, or else to deliver up possession to the plaintiff or be for ever foreclosed, the Court need not disturb it in his interest. Its effect would be that on payment of the sum ordered with interest, the puisne mortgagee would be entitled to possession as mortgagee, both in respect of this original debt and of the sum he was now required to pay for its protection.

And this ruling is in accordance with decisions of the Calcutta and Bombay Courts. Thus in a case which came before the Calcutta High Court, the mortgagee sued on his mortgage, obtained a decree for sale and became the purchaser. Subsequently to the mortgage and before suit the mortgagor had granted a zurpeshgee lease of the properties included in the mortgage. The zurpeshgidar was not made a party to the suit. It was held that the purchaser could not oust the zurpeshgidar; and it was intimated that "his only course would be to bring a suit against the zurpeshgidar to have his right declared to sell the property

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(s) 14 Moore's I.A. 144; S.C. 8 B.L.R. 105.

to satisfy his mortgage-debt, so as to give the zurpeshgidar an opportunity of redeeming" (t).

So also it has been held by the same Court that where a mortgagee of a zemindari brings a suit on his mortgage against his mortgagor, who previously to the mortgage has granted a *patni* lease of the zemindari to a third party, the patnidar should be made a co-defendant, in order that he may have an opportunity to redeem (u).

And the rule, that the interest of a person, who has purchased the mortgagor's equity of redemption is not affected by any decree in a suit to which he is not a party, has been applied by the Calcutta Court to a case in which the purchasers having been joined in the mortgage suit on the mortgagee's motion, had got that suit dismissed as against them on the ground that they were improperly added. The Court held that this did not preclude them in a subsequent suit for possession by the mortgagee, who had himself purchased the property at the sale in execution of his mortgage decree, from claiming to retain the mortgaged property then in their possession on payment of the plaintiff's claim against it on the mortgage. The Court accordingly only gave the plaintiff a decree for possession conditional on the defendant's failure to redeem (v).

The Bombay Court has also applied the same rule. By two deeds, dated February 1868 and September 1872, which were duly registered, A mortgaged certain lands to B for a term of years which expired in 1880. In October 1873 A executed a *râzindâmâ* in favor of B, relinquishing all his right in the lands, and B next day

(t) *Radha Pershad Misser v. Monohur Das*, I.L.R. 6 Calc. 317.

(u) *Kasumunnissa Bibee v. Nilratna Bose*, I.L.R. 8 Calc. 79. See also *Gopee Bundhoo Shantra Mohapattur v. Kalee Pudo Banerjee*, 23 W.R. 338; and *post* pp. (473 *et seq.*)

(v) *Chunder Nath Mullick v. Nilakant Banerjee*, I.L.R. 8 Calc. 690.

executed a kabuliat to Government for the lands which were thenceforward entered in *B's* name. Previous to the second mortgage and *rāzīnāmdā* to *B*, viz., in March 1870, *A* had by a duly registered deed mortgaged the same lands to *X*, who, in 1874, brought a suit against *A* on his mortgage, and obtained a decree under which he sold the mortgaged property and became himself the purchaser. *B* was in possession of the property before and at the time of the institution of that suit, but was not made a party to it. *B* subsequently sold the land to *C* by a duly registered deed. *X* then sued *B* and *C* to get possession of the land on the footing of his purchase at the sale in execution of his own decree. The High Court of Bombay held that *B's* possession at the time *X* instituted his suit was sufficient to put *X* on enquiry and to constitute legal notice to him that the equity of redemption was at that time vested in *B*, and it was, therefore, *X's* duty to make *B* a party to the suit brought by him against *A*. Not having done so *X* could not rely, in support of his own title, upon a purchase under his own irregularly obtained decree, and could not therefore stand in a better position as against *B* than if his original suit had been properly constituted, and he was therefore bound to give *B* an opportunity to redeem his mortgage (*w*).

And so when a person mortgaged the same property to two separate persons, and the first mortgagee brought a suit on his mortgage without making the second mortgagee a party, and obtained a decree, in execution of which the property was sold and purchased by himself, and when at such sale the second mortgagee gave notice of his claim and then brought a suit against the mortgagor

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(*w*) *Naru v. Gulabsingh*, I.L.R. 4 Bom. 83, overruling the dictum of *West, J.*, in *S. B. Shringarpure v. S. B. Pethe*, I.L.R. 2 Bom. 662.

and the first mortgagee for the amount due on his mortgage, it was held by the same Court that the second mortgagee, as representing the equity of redemption of the mortgagor to the extent of his mortgage, should have had an opportunity of redeeming the property from the first mortgagee's mortgage, and have been made a party to the latter's suit, and that not having been so made, he was entitled to a decree framed on the basis of such right of redemption (x).

In a recently reported case (y) a purchaser at a sale under a decree obtained upon her mortgage by a prior registered mortgagee, who had never had possession, sued a subsequent registered mortgagee, who had obtained possession of the mortgaged property at the time of her mortgage, to recover possession of the land, which had been given him at the time of the purchase, but of which he had been afterwards deprived by the subsequent mortgagee, who had recovered it in execution of a decree in ejectment against a person who was in occupation of the land as tenant. The subsequent mortgagee had not been made a party to the prior mortgagee's mortgage suit. It was held by the High Court that the claim of the prior mortgagee against the land was prior to that of the defendant, inasmuch as her mortgage was prior in date to the defendant's mortgage and registered. She had a right to maintain a suit for sale of the land to satisfy her mortgage, but she ought to have made the defendant, as subsequent

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(x) *Damodar Devchand v. Naro Mahadev Kelkar*, I.L.R. 6 Bom. 11. See also *Shaik Abdulla Saiba v. Haji Abdulla*, I.L.R. 5 Bom. 8; *Rupchand Dagdusa v. Davlatrav Vithalarav*, I.L.R. 6 Bom. 495; *Shivram v. Genu*, I.L.R. 6 Bom. 515; *Naran Purshotam v. Dolatram Virchand*, I.L.R. 6 Bom. 538 (F.B.).

(y) *Radhabai v. Shamrav Vinayak*, I.L.R. 8 Bom. 168. Though this case was decided in 1881, before any of the cases in I.L.R. 6 Bom. above referred to, it was not reported till April 1884.



mortgagee, a party to it, inasmuch as the equity of redemption was vested in the defendant to the extent of her (defendant's) share, and she (defendant) would have been entitled to redeem the land by payment of the amount which might have been found due to the prior mortgagee in her suit. The defendant being in possession of the land at the time of the institution of the suit by the prior mortgagee, the prior mortgagee must be regarded as having had notice of the defendant's claim, and was bound to make defendant a party to that suit, in order to give a good title to a purchaser under such decree as might be made in that suit, and that the prior mortgagee, by her omission, did not afford the defendant the opportunity of redeeming, to which the defendant was entitled. The plaintiff, notwithstanding notice of the defendant's claim, became the purchaser, although the defendant was not a party to the suit by the prior mortgagee, and therefore not bound by the decree in it. The plaintiff accordingly was fully aware of the inferiority of the title which he was acquiring. No doubt the decree in the prior mortgagee's suit bound the mortgagor, who was a party to it, so far as his right to redeem was concerned. The plaintiff, therefore, had a good title to the interest of the mortgagor, and was entitled to redeem the land from the defendant's mortgage. The utmost relief which the Court could afford to the plaintiff under the above circumstances was to permit him to amend his plaint by praying a redemption of the land from the defendant's mortgage, and to treat his suit, which was in the nature of an ejectment suit, as one for redemption.

But the view of the Allahabad High Court would appear to be different, so far, at any rate, as suits brought to enforce the lien under the mortgage are concerned.

In the case of a suit for a mere money decree it has been expressly held by a Full Bench of that Court that the



purchaser under the decree takes only the right, title, and interest of the judgment-debtor at the time of the sale, and consequently purchases subject to a second mortgage created prior to its attachment and sale in execution of his decree (2). But it was laid down by *Turner, J.*, in the same case that, when a suit is brought to enforce the lien under the mortgage, though it is not absolutely necessary for the plaintiff to make subsequent incumbrancers parties to the suit, and though if subsequent incumbrancers are not made parties to the suit, they are not bound by the decree which the plaintiff may obtain, and may at any time before sale come in and redeem, yet if they do not redeem and a sale takes place, their liens will be defeated, unless they can show something more than the existence of their subsequent incumbrances, some fraud or collusion which entitled them to defeat the first incumbrance or to have it postponed to their own (a).

And this ruling by *Turner, J.*, has been followed in a later case in which it was held that the purchaser under a decree on his mortgage obtained by a prior mortgagee, against whom no fraud or collusion had been established, must be held to have purchased the property free from the lien of a subsequent incumbrancer who had not been made a party to the mortgage suit, but who not having, before sale, exercised his right of paying off the lien of the prior mortgagee, had allowed the property to pass into the hands of a stranger, by process of law (b).

The case of a decree properly obtained against the father of a joint Hindu family is, however, an exception

(2) *Khub Chand v. Kalian Das*, I.L.R. 1 All. 240 (F.B.)

(a) *Ibid* (cf. p. 245). This ruling may be compared with that of the same Judge in *Venkata v. Kannam*, I.L.R. 5 Mad. 184.

(b) *Ali Hasan v. Dhirja*, I.L.R. 4 All. 518 (cf. pp. 527, 528).

to the rule that only such persons as are parties to a decree on a mortgage are bound by it. In such a case it has been generally held by the Courts in this country that, though the decree has been made against the father alone, and only his right, title and interest have been expressly sold in execution, still the son's interest is bound if it is clear that the father was sued in his representative capacity (c).

But a recent ruling of the Privy Council would seem to throw doubt on the correctness of these decisions, in so far as they purport to apply to cases in which a mere money decree has been obtained against the father alone, and the judgment-creditor is himself the purchaser at the execution sale (d).

The Court, after ascertaining the amount remaining due, will give a decree for it and make a declaration as to the mortgagee's lien.

The provisions of sec. 210 of Act X of 1877 are inapplicable to such decrees, and the Court cannot therefore direct that the amount of the decree be payable by instalments (e). Similarly, the words "decree passed against an agriculturist" in sec. 20 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) have been held by the Bombay High Court not to include a decree for the recovery of money by the sale of mortgaged property.

(c) See *ante*, pp. 61-62.

(d) *Hurday Narain Sahu v. Pundit Rooder Perbask Misser*, L. R. 11 I. A. 26, discussed in *Trimbak Balkrishna v. Narayan Damodar Dabholkar*, I. L. R. 8 Bom. 481, where it was held that where a decree passed upon a mortgage directs the mortgaged property to be sold, the decision in *Deendyal's* case (see *supra* p. 60), which limited the "right, title and interest" which passed under the auction sale to the father's share, does not apply.

(e) *Hardeo Das v. Hukam Singh*, I.L.R. 2 All. 320. See also *Binda Prasad v. Madho Prasad*, I.L.R. 2 All. 129 ; *Bachchu v. Madad Ali*, I.L.R. 2 All. 649.

That section merely enlarges the provisions of sec. 210 of Act X of 1877, but only in cases in which the latter section applies (*f*).

The same Court, however, refused to interfere in a case where a purchaser without notice was forced to satisfy a mortgage, and the lower Court, in consideration of the usurious rate of interest charged, awarded payment by instalments at short intervals (*g*). In that case also the Court, while acknowledging that as a general rule the stipulated rate of interest is properly awardable to a mortgagee until satisfaction of his decree (*h*), and that a mortgagee is entitled to the costs of enforcing his security against one who disputes it, declined to interfere with the decision of the lower Appellate Court which reduced the interest payable under the mortgage from 24 to 6 per cent. from the date of the institution of the suit, and made the mortgagor pay the costs of the first appeal, the original Court having refused to allow any interest at all, and the mortgagee having appealed against that decision.

If the mortgagor does not pay the sum decreed, the mortgagee must apply to the Court to have the mortgaged land sold in execution; and if the Court has declared his lien established, he will be entitled (but only as against parties to the suit) to an order for the sale of the right and interest of the mortgagor in the property, as they stood when the mortgage was entered into. Any surplus, which remains after liquidating the debt, belongs to the subsequent incumbrancers if they are parties to the suit, and subject to their claims, if any, to the mortgagor.

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(*f*) *Shankarapa Dargo Patel v. Danapa Virantapa*, I.L.R. 5 Bom. 604.

(*g*) *J. Carvalho v. Nurbili*, I.L.R. 3 Bom. 202.

(*h*) As to this see also *Futtehma Begum v. Mohamed Ausur*, I.L.R. 9 Calc. 309 (*cf.* p. 314); and *Bandaru Swami Naidu v. Atchayamma*, I.L.R. 3 Mad. 125.

The present Code of Civil Procedure (Act XIV of 1882) is, like the former ones (Acts X of 1877 and VIII of 1859), defective in that it contains no special provisions for the execution of decrees ordering the sale of immoveable property in satisfaction of a mortgage. In such cases the usual practice, in the Mofussil Courts, apparently is to proceed by process of attachment as in the case of other decrees (i).

The Bombay High Court has, however, ruled that in order to enforce a decree which establishes a mortgage and directs a sale of the mortgaged premises in satisfaction of the mortgage, it is not necessary to issue an attachment. If the decree contains, as it ought to contain, a direction for sale of the mortgaged premises, the proceeding under such a decree by attachment is unnecessary as well as expensive and dilatory. The direction for sale in the decree is in itself sufficient authority for the sale, such direction being founded on the specific lien or charge on the mortgaged premises created by the contract of mortgage, and not on the execution clauses in the Codes of Civil Procedure (j).

It has further been held by the same Court that

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(i) *Syud Emam Momtazooddeen Mahomed v. Rajcoomar Dass*, 14 B.L.R. 408 (F.B.) (cf. p. 440); *Khub Chand v. Kalian Das*, I.L.R. 1 All. 240 (F.B.) (cf. p. 245); *Venkatanarsammah v. Ramiah*, I.L.R. 2 Mad. 108 (cf. p. 112); *Dayachand Nemchand v. Hemchand Dharamchand*, I.L.R. 4 Bom. 515 (F.B.) (cf. p. 520); *Narayanrav Damodar Dabholkar v. Ballerishna Mahadev Gadre*, I.L.R. 4 Bom. 529 (F.B.) (cf. p. 534); *Trimbak Balcrisna v. Narayan Damodar Dabholkar*, I.L.R. 8 Bom. p. 481 (cf. p. 486).

(j) *Dayachand Nemchand v. Hemchand Dharamchand*, I.L.R. 4 Bom. 515 (F.B.) (cf. p. 520). See also the observations of *Melville, J.*, in *Narayanrav Damodar Dabholkar v. Ballerisha Mahadev Gadre*, I.L.R. 4 Bom. 529 (F.B.) (cf. p. 534.)

although it is not the practice of the Mofussil Courts (*k*) to require a mortgagee who sues for and obtains a sale of the mortgaged premises, formally to convey to the purchaser, and the latter must be contented with a certificate of sale to him of the right, title and interest of the mortgagor, yet, in fact, the interest of the mortgagee, who causes the sale to be made, is held to pass to the purchaser, and the mortgagee is completely estopped from disputing that such is the effect of the sale (*l*).

The proviso (c) of sec. 266 of Act XIV of 1882 which protects the materials of houses and other buildings belonging to and occupied by agriculturists from attachment and sale in execution of a decree does not extend to such property when it is specifically mortgaged, and the mortgagee is entitled to have it sold to satisfy his mortgage decree (*m*).

Section 243 of Act VIII of 1859 does not apply to a decree on a mortgage, when the decree declares that certain property is to be sold in satisfaction of the mortgage debt, and in such a case a manager cannot be appointed under that section. The judgment-creditor's right of sale in such a case rests on the mortgage decree and not on the attachment in execution, when execution is taken out subsequent to the expiry of the period allowed for repayment of the mortgage debt. Neither can the decree be varied by proceedings in execution thereof (*n*).

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(*k*) The Court was, no doubt, speaking only of the *Bombay* Mofussil Courts, but the practice in the other Presidencies is believed to be the same; see, *e.g.*, *Venkatanarsammah v. Ramiah*, I.L.R. 2 Mad. 108 (*cf.* p. 112.)

(*l*) *Khevrav Jusrup v. Lingaya*, I.L.R. 5 Bom. 2. See also *Balkrishna Vasudev v. Madhavrav Narayan*, I.L.R. 5 Bom. 73; *Shahk Abdulla Saiba v. Haji Abdulla*, I.L.R. 5 Bom. 8.

(*m*) *Bhagvandas v. Hathibhai*, I.L.R. 4 Bom. 25.

(*n*) *Womda Khanum v. Rajroop Koer*, I.L.R. 3 Calc. 335. Compare also sec. 305, Act XIV of 1882, and subsequent sections.

The decree is always against the mortgagor personally, and if the suit has been properly framed, should declare the mortgagee's lien on the land (o).

As to what amounts to a declaration of the mortgagee's lien there has been some conflict in the decisions of the Allahabad High Court. Where the plaintiff sued on a bond in which real property was hypothecated, and in his plaint specifically detailed such property, and prayed for a decree charging the property but the decree passed was in the following terms: "Decree for plaintiff in favor of his claim and costs against the defendant," it was held (by *Oldfield* and *Straight*, JJ.), that having regard to the provisions of sec. 206 of Act X of 1877, this was to be regarded as a mere money decree and not one for the enforcement of the lien (p). So, also, where in a similar suit the plaintiff obtained a decree for the "claim as brought" without any specification in it as to the relief sought by charging the property hypothecated, it was held (by *Spankie* and *Straight*, JJ.), that this only amounted to a money decree, and did not enforce the charge on the property (q).

These two cases were decided subsequent to the case of *Janki Prasad v. Baldeo Narain* (r) which came before the Full Bench. That was a suit on a bond in which real property was hypothecated, and the suit was adjusted by the defendant agreeing to pay the amount claimed and costs with interest within a fixed time, and that, in the event of default, the plaintiff was to be at liberty to bring such property to sale. The Court made a decree ordering the defendant to pay the plaintiff the amount claimed and costs with interest "in accordance

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(o) *Purikhet Khoontya v. Gobind Dass*, S.D.A., 1858, p. 358 ;  
*Doolal Chunder Deb v. Goluck Monee Debia*, 22 W.R. 360.

(p) *Thamman Singh v. Ganga Ram*, I.L.R. 2 All. 342.

(q) *Harsukh v. Meghraj*, I.L.R. 2 All. 345.

(r) I.L.R. 3 All. 216.

with" such agreement, and this was held by the Full Bench (consisting of *Stuart, C.J., Pearson, Turner, Spankie and Oldfield, JJ., Turner and Oldfield* dissenting,) to be a mere money decree, and not one which gave the plaintiff a lien on the property.

Subsequent to the decision of this case by the Full Bench, there seem to have been several decisions the other way, which are unreported, but referred to in the case of *Hursukh v. Meghraj* (s); and the point again came before the Full Bench in the case of *Debi Charan v. Pirbhu Din Ram* (t). There the mortgagee sued the mortgagor to recover the moneys due under the mortgage from the mortgagor personally, and by the sale of the mortgaged property, and the decree was in the following terms: "That the claim of the plaintiff with costs of the suit and future interest at eight annas per cent. per mensem be decreed." This was held by a majority of the Full Bench (consisting of *Stuart, C.J., Pearson, Spankie, Oldfield and Straight, JJ., Spankie and Straight* dissenting) to be a decree not merely for money, but also one for the enforcement of the lien.

A mortgagee should, however, always be careful to see that the decree is properly drawn up, declaring his lien upon the land, and clearly specifying the relief granted to him by the Court. Moreover, it is the duty of the judgment-debtor as well as the decree-holder to see to this. Thus where a decree did not say in express language that the amount decreed was to be recovered in the first instance from the mortgaged property, and that any balance not recovered therefrom might be recovered from the other property belonging to the judgment-debtors, and it was contended on behalf of the judgment-debtors that, although these express words

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(s) I.L.R. 2 All. 345.

(t) I.L.R. 3 All. 388. See also *Ram Prasad Ram v. Raghunandan Ram*, I.L.R. 3 All. 239.



were not to be found in the decree, it ought to be construed as if they had been actually inserted, the Court refused to accede to this contention, and said that if the judgment-debtors were dissatisfied with the decree in the particular form in which it was drawn up, they should have applied to the Court which passed such decree to amend it by inserting words which would have precluded the decree-holders from proceeding against any other property belonging to the judgment-debtors, until they had first exhausted the property included in the mortgage bond (*u*).

If the decree does not restrict the parties in the first instance to the sale of the mortgaged land, but is merely against the mortgagor generally, coupled with a declaration of the lien, the decree-holder may proceed either against the person and his property or against the mortgaged property, subject to the discretion of the Court executing the decree to take such precautions as may be necessary to prevent injury to the mortgagor (*v*).

Thus in a case which came before the Allahabad High Court, the Court applying equity, directed that a decree for money, which ordered the sale of the mortgaged property in satisfaction of its amount, should be executed in the first place against the mortgaged property, which the decree-holder's brother had previously purchased at a sale in execution of another decree against the judgment-debtor, paying a small amount for it in consequence of the existence of his brother's decree, and that it should not be executed against the person of the judgment-debtor until the mortgaged property should prove insufficient to satisfy mortgagee's debt (*w*).

A testator by his will directed payment of all his debts,

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(*u*) *Krishtokishore Dutt v. Rooplall Dass*, I.L.R. 8 Cal. 687.

(*v*) *Luchmi Dai Koori v. Asman Sing*, I.L.R. 2 Cal. 213.

(*w*) *Wali Muhammad v. Turab Ali*, I.L.R. 4 All. 497.

and subject thereto devised his property to his heirs. After one of the testator's creditors had obtained a decree against the heirs in their representative capacity, which by its terms was to be satisfied out of the assets left by the testator, one of the heirs mortgaged his share in twelve properties left by the testator. Subsequent to the mortgage, one of the mortgaged properties was sold in execution of the creditor's decree. The mortgagee brought a suit against the mortgagor and obtained a decree on his mortgage, in execution of which he attached the twelve mortgaged properties, but on the application of the purchaser at the sale in execution of the creditor's decree, the property which he had purchased was released from attachment. The plaintiff then brought a suit against, amongst other persons, the purchaser and the mortgagor, claiming, amongst other things, to have the order, which released the one property sold under the creditor's decree, set aside, and for a declaration that it was liable to satisfy his decree, and the Court held that, as neither the direction in the will for payment of debts nor the decree in the creditor's suit created a charge on the property of the testator, the property sold in execution of the creditor's decree had been sold subject to the mortgage, and the mortgagee was entitled to execute his decree against that property. But, as it appeared that the mortgagee deliberately abstained from executing his decree against eleven properties which still remained in the possession of the mortgagor, and proceeded against the one property which had passed out of the mortgagor's possession, the Court directed the mortgage-debt to be apportioned between the twelve properties, and that the mortgagee should not be allowed to take out execution against the property which had passed out of the mortgagor's possession, except for the amount which should be apportioned

to that property, unless he satisfied the Court that he had made every possible effort to execute the remainder of his decree against the other eleven properties (x).

If the land is proceeded against in the first instance and does not produce a sufficient sum, the mortgagee may still proceed against the mortgagor for the residue unpaid, as an ordinary decree-holder: and in so proceeding he is not restricted to the particular property over which he has a lien. Thus, if his lien extends only to one moiety of an estate, and that moiety proves insufficient, he may take out execution against the whole estate, if the other moiety also belongs to the debtor. As regards the latter moiety, however, his position will be only that of an ordinary decree-holder (y).

But where property, which was subject to a mortgage, was sold in execution of a simple money decree, and the mortgagee afterwards obtained a decree against the mortgagor for the recovery of the mortgage-money from the mortgagor personally and by the sale of the property, which decree he assigned to the purchaser under the money decree, who sought to have the decree executed, not against the mortgaged property, but against the surplus of the proceeds of the sale under the money decree due to the mortgagor, it was held that if the purchaser purchased the property knowing that it was mortgaged, or if in consequence of the mortgage he purchased it for a less sum than it would otherwise have fetched, it would be inequitable to allow him to obtain satisfaction of the decree out of the personal estate of the mortgagor, as he would in that case be in fact paid twice over (z).

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(x) *Ram Dhun Dhur v. Mohesh Chunder Chowdhry*, I.L.R. 9 Calc. 406; and compare the Transfer of Property Act, 1882, s. 82.

(y) *Kishenkanth Dutt v. Ramsoondur Shah*, S.D.A., 1859, p. 1009; *Kalee Pershad Singh Nundee v. Raye Kishoree Dossee*, 19 W.R. 281.

(z) *Gulab Singh v. Pemian*, I.L.R. 5 All. 342.

A mortgagee suing for a debt secured by simple mortgage, and to have the pledged property sold in satisfaction of it, need not include in his suit a prayer to set aside alienations of a date subsequent to that of his own mortgage; for the liabilities of the land are not, so far as the mortgagee is concerned, affected by such transfers (a).

A obtained a decree on a simple mortgage bond. B also obtained a decree on a similar bond, and sold the lands in execution. But B's mortgage was subsequent to A's. It was held that A's rights were not prejudiced by the sale, and that he was entitled to have the property re-sold in execution of his decree, free from all subsequent incumbrances. And the fact that A had not taken out process of attachment against the lands, or given any intimation of his mortgage, at the time of B's sale, was held not to injure A's right (b).

In a case, which came before a Full Bench of the Allahabad Court, where the facts were that a decree enforcing a first mortgage of certain property not being satisfied, the property was sold in execution of a decree of a later date enforcing a second mortgage of the property, it was held by *Stuart, C.J.*, and *Oldfield, J.*, that the decree enforcing the first mortgage could not be executed against the property, but the holder of the decree was bound to bring a fresh suit to enforce it, while *Straight, Brodhurst* and *Tyrrell, JJ.*, held that there was nothing in the law to prohibit such a suit, which appeared to be the most convenient

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(a) *Supra* pp. 293-302. *Karoo Lal v. Dataram*, S.D.A., 1857, p. 953; *Durjungeer Sunnassee v. Gourmohun Shah*, S.D.A., 1857, p. 1063; *Deendyal Ram v. Mothooraloll*, 1 Hay 106; *Shaikh Eida v. Ram Jug Pandey*, 19 W.R. 289; *The Land Mortgage Bank v. Ram Ruttun Neogy*, 21 W.R. 270; *Jungee Loll Mahajun v. Brijoo Beharee Singh*, 2 W.R. (Misc.) 21. See also *Brajaraj Kisori Dasi v. Mohammed Salem*, 1 B.L.R. 152.

(b) *Pursotum Doss v. Baboo Loll*, S.D.A. N.W.P., 1855, p. 680.

and expeditious remedy (c). And in a more recent case a Division Bench of the same Court held that where a second mortgagee had sold the property in execution of his decree, the only course open to a prior mortgagee who held a prior but unexecuted decree was to bring a fresh suit against the purchasers to obtain a declaration of his right to recover the amount of his decree by a re-sale of the property. He could not, as contended by the defendants, have enforced satisfaction of his former decree in accordance with the provisions of sec. 295 of the Civil Procedure Code (Act X of 1877), inasmuch as the provisions of the first and second provisos to that section refer only to sales in execution of simple money decrees, whereas the property in question had been sold in execution of a decree ordering its sale, and the provisions of the third proviso related to subsequent and not prior incumbrances (d).

There are several cases in which the right of a mortgagee, who holds an unexecuted decree on his mortgage, to bring a second suit to enforce his lien against third parties who have resisted the execution of his decree, has been contested on the ground that such a suit is barred by the provisions of the Code of Civil Procedure.

Thus where a mortgagee, who had brought a suit against his mortgagor to have a declaration of his lien on the mortgaged properties and obtained a decree upon his mortgage against his mortgagor, afterwards brought a suit against certain attaching creditors of his mortgagor to have a declaration of his lien over certain surplus moneys in the hands of the Collector who, previous to the institution of the mortgage-suit, had sold certain of the mortgaged properties free of all incumbrances for arrears of Government revenue, it was contended on behalf of the defendants,

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(c) *Jagat Narain v. Jag Rup*, I.L.R. 5 All. 452 (F.B.).

(d) *Jagat Narain Rai v. Dhundhey Rai*, I.L.R. 5 All. 566.

that the suit was barred by sec. 7 of Act VIII of 1859 (corresponding with sec. 43 of the present Code) because in his suit against the mortgagor, the mortgagee, knowing that certain of the mortgaged properties had been sold for arrears of revenue, did not apply to have the surplus sale proceeds declared subject to his mortgage lien, but merely asked for and obtained a decree against the mortgaged properties. But the Court held that the cause of action in the two suits was distinct. In the first suit the mortgagee sought to establish his mortgage-debt and his lien on the mortgaged premises, and to obtain an order of the Court enforcing it, and the cause of action was the default of the mortgagor to make payment within the stipulated time. The cause of action in the present suit was the opposition of certain creditors to the satisfaction of the mortgage-decree out of money which represented the balance due to the mortgagors after payment of Government revenue on certain of the mortgaged properties sold under Act XI of 1859 in consequence of their default (e).

Again, the obligee of a bond for the payment of money, in which certain property was mortgaged as collateral security, sued the obligor for the money due on the bond, claiming the enforcement of the mortgage. At the time the suit was brought the property was in the possession of a third person, who had purchased it at a sale in execution of a money decree against the obligor of the bond. The obligee did not make the purchaser a party to the suit. Being resisted in bringing it to sale by the purchaser, he sued him to have it declared that the property was liable to be sold under his decree. It was held that the second suit was not barred by the provisions of sec. 43 of Act X of 1877, as the cause of action in the former suit arose

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(e) *Kristodass Kundoo v. Ramkant Roy Chowdhry*, I.L.R. 6 Calc. 142.



under the bond and gave a claim against the obligor only, and there was no necessity to make any other persons defendants, while the present claim was a distinct one in respect of a distinct cause of action (*f*).

In another case, decided by the Allahabad Court, the obligee of a bond to secure the repayment of a loan by instalments, the property being hypothecated as collateral security for the due payment of such instalments had, in a suit which was held by the Court to be one to enforce his lien (*g*), obtained a decree against the obligor for the payment of certain instalments due under the bond and also a declaration that he was entitled to execute the decree to realise each subsequent instalment as it became due. He subsequently applied for execution of the decree in respect of certain instalments which had fallen due subsequent to the decree being passed, by sale of the property which had passed into the hands of a third party since the decree. On execution being refused he brought a suit to enforce his lien against the property in respect of those instalments, and it was held not to be barred; for, though the first suit included a claim for the enforcement of the lien which was not decreed, yet, as it was questionable whether a Court was competent to grant a declaration of right to recover instalments which were not due by executing a decree for instalments which were due, the claim in the second suit was held not to be the same as that in the former suit, and therefore sec. 13 of Act X of 1877 did not apply (*h*).

In a recent Calcutta case the facts were that the plaintiffs

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(*f*) *Bahraichi Chaudhri v. Surju Naik*, I.L.R. 4 All. 257.

(*g*) In the plaint the land was described as a debt—a proceeding which the Chief Justice (*Sir R. Stuart*) characterised as an “absurd eccentricity.”

(*h*) *Umrao Lal v. Behari Singh*, I.L.R. 3 All. 297.



had advanced money to *C*, a Hindu governed by the Mitakshara school of law upon mortgage of ancestral property. *S*, who was stated to be *C*'s only son, joined in the mortgage. Subsequently the plaintiffs obtained a decree against *C* and *S* for the amount due on the mortgage, making the mortgaged property liable in satisfaction. On attempting to sell the mortgaged property other sons of *C* objected. The objection was allowed and the mortgagees were referred to a regular suit. They then sued all the sons of *C*, who had died in the meantime, to establish their lien on the mortgaged property. It was contended on behalf of the sons, who had not joined in the mortgage, that the suit was barred under secs. 13 and 43 of the Code of Civil Procedure (Act XIV of 1882), inasmuch as it was based upon a cause of action upon which a suit had been brought and disposed of, that there was no separate cause of action upon which this suit had been brought, and that though they were not parties to the original suit which was brought upon the bond, still, if they were jointly liable with the executants of the bond, a second suit would not lie against them, the cause of action having been exhausted in the first suit. The Court was, however, of opinion that this whole contention was based upon a misapprehension as to the nature of the plaintiff's suit, which a consideration of the nature of the execution proceedings in the previous suit showed not to be a suit to make the defendants liable upon the original cause of action, but a suit<sup>t</sup> which the plaintiffs were entitled to bring under sec. 283 of the Code of Civil Procedure to have it declared that the mortgaged property was liable to be sold in execution of the plaintiff's decree in that suit (i).

Where the mortgaged property has been sold by the

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(i) *Sitanath Koer v. Land Mortgage Bank of India*, I.L.R. 9 Calc, 888.

mortgagor subsequent to the mortgage, and the purchaser is a party to the mortgagee's suit, the decree should reserve to the purchaser the right to save the property from sale on his paying off the sum due to the mortgagee (j).

If the mortgagee's suit is merely for the recovery of the money due to him, the fact of the decree being silent as to the particular property against which he may execute his decree, does not invalidate his lien. But if the mortgagee has only a decree for the payment of a sum of money, he cannot execute it against the mortgaged property, to the prejudice of a *bond fide* purchaser. He may, however, enforce his lien on the mortgaged property by separate suit against the subsequent purchaser in possession (k).

A person, on borrowing a sum of money, gave his bond for it: and the bond also pledged certain property, providing that any sale or mortgage of it, until the lender's claim was satisfied in full, should be invalid. The lender afterwards brought a suit for the money in the Supreme Court and obtained a decree. He attempted to execute his decree, as an ordinary judgment-creditor, by sale of the property pledged, but was resisted by some intermediate incumbrancers whom he found in possession. He then instituted a suit in a Mofussil Court to realise the sum which had been decreed

(j) *Purikhet Khoontya v. Gobind Dass*, S.D.A., 1858, p. 358; *Gopee Bhundhoo Shantra Mohapattur v. Kalee Pudo Banerjee*, 23 W.R. 338; *Khub Chand v. Kalian Das*, I.L.R. 1 All. 240 (cf. p. 245 per Turner, J.). And see post pp. 472 et seq.

(k) *Gopeenath Singh v. Sheo Sahoy Singh*, 1 W.R. 315 (F.B.); *Mohun Ram v. Sheo Narain Singh*, 2 W.R. 130; *Mednee Pershad v. Modhoo Mungle Singh*, 2 W.R. 282; *Shaikh Mowla Bulsh v. Bhyrab Doss*, 5 W.R. 115; *Bindabun Chunder Shaha v. Janee Bibee*, 6 W.R. 312; *Goluck Monee Debia v. Ram Soondur Chuckerbutty*, 9 W.R. 82; *Gopee Muktoon v. Jhugoo Muktoon*, 9 W.R. 150; *Surwan Hossein v. Shahazadah Golam Mahomed*, 9 W.R. 170 (F.B.); *Biswanath Mukhopadhyaya v. Gosaindas Bara Madak*, 3 B.L.R. (app.) 140.

to him, by setting aside the intermediate incumbrances, as illegal and contrary to the terms of his mortgage. It was held that, inasmuch as there was an express pledge of the lands to him, and a proviso that any sale or mortgage of them prior to the payment of his debt should be invalid, the mortgagees having already obtained a decree for money without any allusion being made to the sale of this particular property in execution, did not injure his lien, and that he was still entitled to bring the mortgaged lands to sale free from subsequent incumbrances (l). But the lands could be so sold, only if the subsequent incumbrancers were parties to the suit and did not exercise their right to redeem.

In a case in which the mortgagee had got merely a decree for the payment of money, ignoring the existence of a mortgage, a subsequent decree-holder came in and sold the right and interest of the mortgagor in the property mortgaged. It was held that the mortgagee might still follow the land until his debt was satisfied, but that he could not claim the money realised at the sale in execution of the subsequent decree which had been obtained (m). If, however, in such a case as this, the mortgagee wished to follow the land, he would have to get a decree establishing his lien as against the purchaser, if the latter were in possession (n).

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(l) *Abadie v. Maxwell*, S.D.A. N.W.P., 1853, p. 316. See also *Hunooman Doss v. Mussumut Koomeroonnissa Begum*, 1 Hay 266; S.C. W.R. (Sp.) 40.

(m) *Woomasoonderee Debea v. Chowdhry Rughonath Dass*, S.D.A. 1860, vol. 2, p. 35. See also *Sheobuksh Singh v. Sheochurnlal Sahoo*, S.D.A., 1858, p. 498; *Karoo Lal v. Dataram*, S.D.A., 1857, p. 953.

(n) *Gopeenath Singh v. Sheo Sahoy Singh*, 1 W.R. 315. See *ante* p. 381.

Where, however, the obligor of a bond, hypothecating immoveable property as collateral security, omitting to claim the enforcement of his lien, had sued the obligor for the moneys due on the bond, and had obtained a decree only for the payment of the amount of the bond debt, the Allahabad High Court held that, under sec. 43 of Act X of 1877, as amended by sec. 7 of Act XII of 1879 (o), he could not be permitted subsequently to sue the obligor, and certain persons who had purchased the hypothecated property at a sale in execution of a money decree prior to the date of his money decree, to enforce his lien (p).

When a mortgagee (by simple mortgage) gets a mere money decree and under it attaches and sells the mortgaged property, the whole interest, both of the mortgagor and of the mortgagee, passes to the purchaser,—in other words, if a mortgagee who has got only a money decree attaches and sells the right, title and interest of the mortgagor in the property, the purchaser takes the whole interest of both the mortgagor and the mortgagee, and the latter cannot afterwards sue for a declaration that his debt is a charge on the land, and for sale, &c., under his mortgage (q).

In the first of the cases in which this was expressly laid down here (r), the mortgagee, after obtaining a money decree against the mortgagor, and attaching the mortgaged property, assigned the decree to a purchaser for value. The Court held that as the form of mortgage or charge created

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(o) Compare sec. 43 of Act XIV of 1882.

(p) *Gumani v. Ram Padarath Lal*, I.L.R. 2 All. 838.

(q) Compare the Transfer of Property Act, 1882, which prohibits sales of mortgaged properties under money decrees. For the subject discussed in the following pages the note entitled "Purchaser under money decree on mortgage bond" at pp. 291—293 of O'Kinealy's Code of Civil Procedure (Act XIV of 1882) may be usefully consulted.

(r) *Syud Nadir Hossein v. Pearoo Thovildarinee*, 14 B.L.R. 425 (note); S.C. 19 W.R. 255; but compare *Sheo Prosun Singh v. Brojoo Sahoo*, 7 W.R. 232.

by the bond, did not vest any estate in the mortgagee but only established a lien as incident to the money debt, such lien continued an incident of the debt when it passed from a contract-debt into a judgment-debt, and so continued when the judgment-debt was subsequently assigned,—otherwise the right to the lien must have remained in the mortgagee. But as the judgment-debt represented the full amount for which the mortgagor and the land were liable, and as the mortgagee had transferred the judgment-debt to a purchaser for full value, the mortgagee could not retain the lien, against either the mortgagor or the assignee of the decree. He could not retain it against the mortgagor, for he had no longer any debt or demand against him or the lands: and as the mortgagor had neither done nor paid anything to discharge the lien, it must still have continued to exist. But the only possible existence it could have would be as incidental to the judgment-debt: and therefore the sale of the money decree passed with it the lien under the bond. The lien could be enforced against the property, only so long as it remained the property of the mortgagor, and by attachment under the decree,—though if the property had before attachment passed into the hands of third persons, a separate suit would have been requisite to enforce the lien against the land in the hands of such third persons.

It was urged in this same case that because the property was situate in the district of Maldah, the Moorshedabad Court (in which the decree had been obtained) could have no power to affect it by its decree. But the Court said,—“The effect of the decree in the Moorshedabad Court was not to create any right against the land, but to turn a contract-debt, to which a lien was incident, into a judgment-debt to which, without any operation of the Moorshedabad Court, any already existing lien would attach by reason of

its representing the original contract-debt. Moreover, at the date of the sale to the assignee of the decree, the property over which the lien extended had already in fact been attached by the mortgagee under his decree: and it seems clear that an attachment under a money decree on a mortgage bond, and the mortgage lien, cannot co-exist separately in the property hypothecated, and that such an attachment must be treated, when existing, as an attachment enforcing the lien" (s).

And this decision was affirmed by a Full Bench in the case of *Syud Emam Momtazooddeen Mahomed v. Rajcoomar Dass* (t). In this case the question referred to the Full Bench was, "Whether a creditor, who has resorted to the summary procedure provided by sec. 53 of Act XX of 1866 (Registration Act) and has recovered a portion of his claim in execution of the decree so obtained, is afterwards at liberty to bring a regular suit for the enforcement of his remedies under the bond, merely giving the defendant credit for such amounts as he has already recovered;" and the Full Bench held he was not. In the judgment of the majority of the Court the following observations

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(s) *Syud Nadir Hossein v. Pearoo Thovildarinee*, 14 B.L.R. 425 (note); S.C. 19 W.R. 255 (cf. p. 259). See *ante* p. 438.

(t) 14 B.L.R. 408 (F.B.); S.C. 23 W.R. 187, followed in *Gopee Bundhoo Shantra Mohapattur v. Kalee Pudo Banerjee*, 23 W.R. 338; *Muthoor Mohun Roy Chowdhry v. Pearee Mohun Shaha*, 23 W.R. 344; *Modho Soodun Singh v. Mokundee Lall Sahoo*, 23 W.R. 373; *Aruth Soar v. Juggunnath Mohapattur*, 23 W.R. 460; *Hasoon Arra Begum v. Jawadonnissa Satooda Khandan*, I.L.R. 4 Calc. 29; *Mulhora Nath Pal v. Chundermoney Dabia*, I.L.R. 4 Calc. 817, and compare the principle laid down in *Bhuggobutty Dossee v. Shamachurn Bose*, I.L.R. 1 Calc. 337 (cf. p. 353), which was a suit on a mortgage in the English form of property in Calcutta. See also *Sheo Prosun Singh v. Brojoo Sahoo*, 7 W.R. 232; *Raj Chunder Shah v. Hur Mohun Roy*, 22 W.R. 98; and *Doolal Chunder Deb v. Goluck Monee Debia*, 22 W.R. 360, which were earlier decisions,



occur (u) : "In considering the nature of proceedings under sec. 53 of Act XX of 1866, we must look at the nature of the remedy obtainable thereunder, and for this purpose it is necessary to examine the effect of decrees for realization of debts made in ordinary suits. A decree under sec. 53 is at least equivalent to a money decree in an ordinary suit, and on examination it seems to us that there is no substantial difference between the effect of an ordinary money decree on a mortgage bond and a decree on the same bond for the recovery of the money due by sale of the mortgaged property. So that, whether a decree for the money be made under sec. 53 or in a regular suit, the remedy of the mortgagee is the same. When a creditor under a bond, by which property is mortgaged, takes a money decree and proceeds to attach and sell the mortgaged property, he thereby transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor, and if there be no third party interested in the property, it becomes vested absolutely in the purchaser.

"If the sale be under a decree for sale, it can do no more than this. There is, we think, no warrant for holding that, when a sale is under a decree for sale, it conveys the rights of both creditor and debtor ; but that when it is in execution of a simple money decree only, the rights of the debtor pass ; and the creditor retains his lien. The object of a sale of mortgaged property, in execution of a decree, is not to transfer the debt from the debtor to the purchaser of the mortgaged property, but to obtain satisfaction out of the security. Thus, whether the decree do or do not direct the sale of the mortgaged property, the mortgagee, when he puts that property up for sale, sells the entire interest that he and the mortgagor could jointly sell. It cannot be

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(u) *Syud Emam Momtazooddeen Mahomed v. Rajcoomar Dass*, 14 B.L.R. 408 (cf. pp. 421 *et seq.*) S.C. 23 W.R. 187.



rightly contended that the mere taking of a money decree extinguishes the creditor's lien. There is a case of *Sawruth Singh v. Bheenack Sahoo* (v) which seems to go to this length; see the passage beginning 'now it appears to us;' but these words are qualified by a passage further on, 'we do not say' &c.; and the case of *Ramchurn Lall v. Koondun Koomaree* (w) is directly the other way. If then the lien be not extinguished by taking a money decree, and if it continue an incident of the debt when it passes from a contract-debt into a judgment-debt [see *Syud Nadir Hossein v. Pearoo Thovildarinee* (x)], as the creditor cannot sell the property and retain the lien, it must continue in existence, as far as may be necessary, for the protection of the purchaser. An order for sale cannot conclude persons not parties to the suit, and without such order, in the absence of any third party interested in the property, a complete title passes by the sale in execution of the money decree.

"If there be persons not parties to the suit claiming an interest in the property, no form of dealing with the property in their absence can prejudice their rights. The decision of the Full Bench in *Gupinath Sing v. Sheo Sahay Sing* (y) is clear on this point. It seems to us that that decision does no more than declare this as a fundamental rule. The expression 'he is simply in the position of an ordinary judgment-creditor in respect of his decree, and can only sell the rights and interests of his debtor,' could not be intended to limit the decree-holder's power of selling the rights conferred by his lien.

"Reading these words with the context, they seem to us only to import that the subsequent incumbrancer cannot be

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(v) 14 B.L.R. 422 (note.)

(w) 14 B.L.R. 423 (note.)

(x) 14 B.L.R. 425 (note), and see *supra* pp. 473, 474.

(y) B.L.R., (F.B.R.) 72.

concluded by any order made otherwise than in a suit to which he is a party, but as to whether this is to be brought by the first creditor or his assignee under the execution sale, there is nothing said. The judgment only deals with the case of a creditor himself seeking to enforce his lien, and who has not assigned it to another by a sale in execution.

"The fact that property is mortgaged to one is no bar to a mortgage or sale of the equity, or right of redemption to another.

"The remedy of the mortgagee under a mere money decree and under a decree for sale being identical, so far as the parties to the suit are concerned, he cannot have a right to a second suit against the same parties to enforce what he has already obtained."

It must be clearly borne in mind that the question as to the rights of third persons, not parties to the suit on the mortgage bond, was not before the Full Bench. In delivering judgment, however, the learned Judges incidentally expressed certain opinions on the point, which for a time caused uncertainty as to the effect of their judgment. Thus it was at one time held that under the Full Bench ruling a mortgagee, who had himself purchased the mortgaged property at a sale in execution of a money decree on his mortgage bond, could not sue the mortgagor and a purchaser under a previous money decree to enforce his lien against the mortgaged property (z). But when the plaintiff in this suit subsequently brought a suit against the same parties for possession of the property itself, it was held by a Full Bench, overruling the decision last referred to, that the plaintiff could properly sue to have his

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(z) *Doss Money Dossee v. Jonmenjoy Mullick*, I.L.R. 3 Calc. 363.

lien on the property declared, and that he had no right to sue for the restoration of the mortgaged property (a).

And it must now be taken to be settled, so far as the Calcutta Court is concerned, that if a mortgagee, suing on a bond by which lands are mortgaged as security, takes a mere money decree and under it attaches and sells the mortgaged property, he thereby, so far as he himself and the mortgagor are concerned, transfers to the purchaser the benefit of his own lien and the right of redemption of (*i.e.*, the whole estate remaining in) the mortgagor. If there be no third party interested in the property, the purchaser under the decree takes it absolutely, just as much as if the decree declared the land to be subject to the mortgage. But subsequent incumbrancers, such as a second mortgagee, or one who has purchased the remaining rights of the mortgagor, are not concluded by the proceedings in a suit to which they are not parties, and they are entitled to redeem those above them. Ordinarily, and especially when they are in possession, a separate suit against such claimants under a puisne title will be necessary on the part of the purchaser in order to complete his title and make himself absolute owner of the property.

But as the reason for the ruling that the mortgagee's lien passes with the property, when the mortgagee puts it up for sale and sells it, is that, having regard to the nature and object of the sale, the lien is inseparable from the mortgage, it follows that when the mortgagee professedly puts up the property for sale, but in fact sells nothing, because the mortgagor has no property to sell, the mortgagee's lien does not pass to the purchaser. Where, therefore, the portion of the mortgaged property which the plaintiff

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(a) *Jonmenjoy Mullick v. Dossmoney Dossee*, I.L.R. 7 Calc. 714 (F.B.); and compare *Rajkishore Shaha v. Bhadoo Noshoo*, I.L.R. 7 Calc. 78 (*cf.* p. 81), and *Janoky Bullubh Sen v. Johiruddin Mahomed Abu Ali Soher Chowdhry*, I.L.R. 10 Calc. 567 (*cf.* pp. 571 *et seq.*).

purchased had been sold by Government for arrears of rent previous to the date of the sale to plaintiff, it was held that as, at the date of the sale to plaintiff, the mortgagor had no right to the property, the plaintiff purchased nothing, and, therefore, was not entitled to maintain a suit against the purchaser at the Government sale, who had successfully resisted a suit brought against him by the plaintiff for possession, to recover the amount which he had paid, professedly for the mortgagee's right, title and interest in the property (b).

In a recent case the facts were that the parties were purchasers at auction of the same property in execution of two separate decrees, and the plaintiff sued the defendant for possession, on the ground that his purchase, though it was the more recent, was one in execution of a mortgage decree on a mortgage which had been made, and the decree on it obtained previously to the purchase by the defendant. The Court, however, decided that the plaintiff's decree was only a money decree, and on the authority of the Full Bench decision in *Syud Emam Momtazooddeen Mahomed v. Rajcoomar Dass* (c) dismissed the suit, holding that though the plaintiff might have purchased the lien of the mortgagee, he was not entitled to recover possession of the property, as against a person who was not a party to that decree, and was a *bonâ fide* purchaser for value, without bringing a suit to enforce his lien (d).

It has lately been held that though the Full Bench rulings in *Syud Emam Momtazooddeen Mahomed v. Rajcoomar Dass* (e) and *Jonmenjoy Mullick v. Dossmoney Dossee* (f) establish that when the property is still in the

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(b) *Ramanath Dass v. Boloram Phookun*, I.L.R. 7 Calc. 677.

(c) 14 B.L.R. 408 (F.B.) ; S.C. 23 W.R. 187.

(d) *Bir Chunder Manikya v. Mahomed Afsarooddeen*, I.L.R. 10 Calc. 299.

(e) 14 B.L.R. 408 (F.B.) ; S. C. 23 W.R. 187.

(f) I.L.R. 7 Calc. 714 (F.B.).

hands of the mortgagor, a mortgagee who has obtained a money decree on his mortgage must enforce his lien in execution and cannot maintain a separate suit for the purpose, while if it has passed to a purchaser, he may enforce his lien by suit against the property in the hands of the purchaser; the mortgagee does not acquire a more extensive right in the one case than in the other. Where, therefore, a mortgagee, who had obtained a decree on his mortgage, which was only partly satisfied, sued certain subsequent purchasers to enforce his lien against the mortgaged property in their hands and to recover the amount of the mortgage debt still due to him, it was held that, as he had allowed his decree against the debtor to be long since barred by limitation and had, therefore, lost all right to proceed by execution against the property in the hands of the debtor, he had no better right to proceed by suit against the property in the hands of the purchasers (g).

The principle affirmed by the Calcutta Full Bench in *Syud Emam Momtazooddeen Mahomed v. Rajcoomar Dass* (h) has been adopted by the Bombay Court. That Court has held that, although the mere taking of a money decree for a mortgage debt does not extinguish the lien, still when the mortgagee proceeds to satisfy such decree by the sale of his security, the interests of both himself and his judgment-debtor in the security pass to the auction-purchaser. The particular nature of the right acquired by the purchaser at the sale does not depend on the form of the decree on which the mortgagee has proceeded to satisfy his judgment-debt. What the mortgagee really seeks when he proceeds to sell, whether under a decree for sale or under a simple money decree, is to obtain

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(g) *Cally Nath Bundopadhya v. Koonjo Behary Shaha*, I.L.R. 9 Calc. 651.

(h) 14 B.L.R. 408 (F.B.); S.C. 23 W.R. 187.

satisfaction out of his security, or, in other words, to enforce his lien; and although this proceeding may be in execution of a money decree only, he cannot retain his lien for enforcement, *quâ* mortgagee, if the debt be not discharged by a second sale of the same property (i).

And in a late case (j), in which it was held that a mortgagor cannot, under the Dekkhan Agriculturists' Relief Act, 1879, any more than under the ordinary law, sue his mortgagee in a mere action for account, the Court, after pointing out that in Bombay, under Bom. Reg. V of 1827, sec. 15, a mortgagee, who is placed in possession of the mortgaged property, is, in the absence of special agreement, entitled to look to the property only for payment of his mortgage money, made the following observations as to the effect of a mere money decree in cases in which it may lawfully be obtained (k): "Even where the mortgagee is entitled to a personal decree against the mortgagor or his heir or representative, and takes a mere money decree against him upon the mortgage without any direction that the amount of the decree should be recovered by sale or otherwise from the mortgaged property, the mortgagee nevertheless would have the right to attach and sell that property under the money decree, and such sale would transfer to the purchaser the interest both of the mortgagor and mortgagee in the same manner as if the sale had been made under an express direction in the decree: *Syud Emam Momtazooddeen Mahomed v. Rajcoomar Dass* (l); *Narsidas Jitram v. Joglekar* (m). Even though the officer

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(i) *Narsidas Jitram v. G. Joglekar*, I.L.R. 4 Bom. 57. See also the cases therein cited and *Kheeraj Jusrup v. Lingaya*, I.L.R. 5 Bom. 2; *Sheshgiri Shanbhog v. Salvador Vas*, I.L.R. 5 Bom. 5; *Shaikh. Abdulla Saiba v. Haji Abdulla*, I.L.R. 5 Bom. 8.

(j) *Hari v. Lakshman*, I.L.R. 5 Bom. 614.

(k) *Ibid*, cf. p. 618.

(l) 14 B.L.R. 408 (cf. p. 421) (F.B.); S.C. 23 W.R. 187.

(m) I.L.R. 4 Bom. 57.



of the Court may merely mention the right, title and interest of the mortgagor as what is sold, the interest of the mortgagee who has promoted the sale, passes by way of estoppel (n), although the mortgagee executes no conveyance to the purchaser. We perceive that an inference to the contrary was sought to be shown in the argument in *Narsidas Jitram v. Joglekar* from *Tukaram v. Ramchandra* (o). That inference, however, is not sustainable, inasmuch as the money decree in *Tukaram v. Ramchandra*, under which the sale was made, was not obtained in respect of the mortgage, but upon another cause of action vested in the mortgagee and wholly unconnected with the mortgage. The only difference which we make in execution between a money decree upon a mortgage and a money decree not upon a mortgage is, that where the mortgaged lands are attached under the former, the sale of them is deferred until six months, or some other reasonable period expires in order to give to the mortgagor the opportunity of redeeming, which would be afforded to him in a suit for foreclosure or redemption."

The Allahabad High Court, however, have held that a purchaser under a mere money-decree, takes only the right, title and interest of the judgment-debtor as they stood on the date of the attachment, and therefore that the holder of a simple mortgage bond, who had obtained only a money decree on the bond, in execution of which the property hypothecated in the bond was brought to sale, and was purchased by him, could not resist a claim to foreclose a second mortgage of the property created prior to its attachment and sale in

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(n) See *Ranji v. Krishnaji*, 11 Bom. H.C. 139 (cf. p. 142 and the cases cited at p. 140); and see *Shaik Abdulla Saiba v. Haji Abdulla*, I.L.R. 5 Bom. 8 (cf. p. 13).

(o) I.L.R. 1 Bom. 314.



execution of his decree (*p*). And this ruling was followed in a later decision in which it was held that in such a case the mortgagee could not bring a second suit to enforce his lien under his bond against certain persons who were in possession of the property under a lease granted by the mortgagor prior to the mortgagee's first suit (*q*).

And that view of the law would appear to have been adopted by the Madras High Court in a recent case (*r*). In this case the facts were that *S*, the original owner of the land in suit, mortgaged it to *R* in 1861. *R* pledged the mortgage-deed to *H* to secure repayment of a loan of Rs. 500. *P* being entitled on partition with *H* (his brother) to half of the debt due by *R*, got a decree against *R* in the Small Cause Court for his moiety in 1870. *R* sued *S* on the mortgage-deed (obtained from *P* and *H* for that purpose), got a decree to enforce the mortgage, and in July 1872 bought the land in execution of the decree. In December 1872 *R* mortgaged the land to *V* and put him in possession. *V* had no notice of the prior pledge to *P*. In 1876 *P*, in execution of his Small Cause Court decree, attached and sold the right, title and interest of *R* in the land, became the purchaser at the Court sale, and was put into possession by an order of the Court executing the decree, *V*'s claim under sec. 269 of Act VIII of 1859 being rejected. In a suit by *V* against *P* to recover possession of the land the Court held that he was entitled to recover. The Chief

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(*p*) *Khub Chand v. Kalian Das*, I.L.R. 1 All. 240 (F.B.) See also *Alke Ram v. Nand Kishore*, I.L.R. 1 All. 236 (F.B.)

(*q*) *Balwant Singh v. Gokaran Prasad*, I.L.R. 1 All. 433.

(*r*) *Vencatachella Kandian v. Panjanadien*, I.L.R. 4 Mad. 213. See also the observations of *Turner*, C.J., in *Ponnappa Pillai v. Pappu-vayyanganar*, I.L.R. 4 Mad. 1 (F.B.) (cf. pp. 65 *et seq.*); but compare the observations of *Kernan*, J., in *Venkatanarsammah v. Ramiah*, I.L.R. 2 Mad. 108 (cf. p. 112) *contra*.

Justice (*Sir C. Turner*), though declaring his inability to accept the application of the principle adopted by the Court in the case of *Ramu Naikan v. Subbaraya Mudali* (s) proceeded (t) to distinguish that case from the one before the Court, on the ground that in the former case the first mortgagee obtained possession lawfully, whilst in that before the Court he had obtained it unlawfully. He, however, gave as his reason for holding that the defendant had obtained possession of the land unlawfully, not only that he held a moiety of a simple mortgage which he could enforce only in conjunction with his brother, but that he had taken no steps to enforce his mortgage, inasmuch as he could only do this by obtaining a *decree of Court directing a sale*. He also expressly held that the defendant, by the purchase of the right, title and interest of *R* in 1876 and his money-decree, acquired no more than the right which *R* then had in the land, that is, he acquired the land subject to the right of the plaintiff under the mortgage of 1872 (which was made subsequent to the defendant's mortgage and decree). And *Kindersley, J.*, also held that, that which the defendant purchased in execution of his decree for money was no more than the right, title and interest of *R* at the time of the execution.

The principle of these Allahabad and Madras decisions would appear to be that, as the object for which the lien was created was the discharge of the debt, and as this object fails when the mortgaged property is sold in discharge of the

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(s) 7 Mad. H.C. 229. In this case it was held that a prior mortgagee, who had himself purchased the mortgaged property under a simple money decree, in which no reference was made to his mortgaged lien, could still use his mortgage as a shield against the claims of subsequent mortgagees, who got all to which they were entitled when they were allowed to redeem the prior mortgage. See also *ante* p. 314.

(t) *Vencatachella Kandian v. Panjanadien*, I.L.R., 4 Mad. 213 (*cf.* p. 215.)

debt, the lien must, when the object for which it was created fails, cease to exist (*u*).

Under the rulings of the other High Courts referred to above, the mortgagee's lien is deemed to continue in existence, so far as is necessary for the protection of the purchaser even after a sale of the mortgaged property in discharge of the debt. The general practical difference between the two sets of rulings would accordingly appear to be that in the N.W.P. and Madras, a purchaser under a money decree is, as regards third persons who were not parties to the decree, in the same position as the mortgagor was at the date of the sale, while in Bengal and Bombay he is also vested with all the rights and liabilities of the mortgagee at whose instance the property was sold. In the N.W.P. and Madras, therefore, such a purchaser cannot recover possession of the property as against third parties who were lawfully in possession of it at the date of his purchase, and he cannot resist a suit on his mortgage brought by a subsequent incumbrancer, except on the same terms as the original mortgagor could do so, namely, by redeeming the mortgage. On the other hand, in Bengal and Bombay, such a purchaser can fall back on the lien of the mortgagee whose interests he purchased, and unless they are willing to redeem the lien, can recover possession of the property as against third parties, whose title accrued subsequent to the creation of his lien, whilst any suit by a subsequent incumbrancer brought against him can be resisted until the subsequent incumbrancer has redeemed the lien which the purchaser acquired. The result would seem to be that the second incumbrancer is in a worse position under the rulings of the Calcutta and Bombay

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(*u*) See *Khub Chand v. Kalian Das*, I.L.R. 1 All. 240 (per *Turner, J.*, cf. p. 246).

Courts than under those of the other High Courts. For according to the former the interest of the first mortgagee as well as that of the mortgagor is vested in the purchaser, and the second incumbrancer must, therefore, redeem the lien under the first mortgage before he can enforce his mortgage against the property in the hands of the purchaser.

Where there were two purchasers who had bought the same property at two several auction sales under decrees obtained on two several mortgage-bonds, and the one purchaser sued the other merely for possession of the property, it was held by the Calcutta High Court that the question as to which mortgage was prior in point of time could not be tried in that suit, though it might be raised in one properly framed for the purpose. In the suit before the Court the only question was, which of the parties could prove a better right to possession, and this right could not depend upon which of the mortgages was first (*v*). And this ruling was followed in another case, in which it was held that, as the suit was one for possession, the party who first purchased the mortgagor's interest and obtained possession, was entitled to retain it as against the other purchaser, although his own right might be merely that of a trustee for the mortgagor, and might be subject to the other purchaser's mortgage lien, if the latter took proper proceedings to enforce it (*w*).

In another case which came before the Madras High Court, *A* mortgaged certain property to *B* on the 15th July 1864, and on the 8th January 1868 executed another mortgage over the same property in *C*'s favor. In 1871 a suit was brought by *B* on the mortgage of 1864 and a decree was made in that year directing that, if the

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(*v*) *Nanack Chand v. Teluckdye Koer*, I.L.R. 5 Cal. 265.

(*w*) *Dirgopal Lal v. Bolakee*, I.L.R. 5 Cal. 269.

sum secured were not paid within two months the property should be sold. In March 1872 the money not being paid, the property was sold and purchased by *B*, who was put into possession. In 1871 *C* instituted a suit against the mortgagor on the mortgage of 1868 and a decree similar to that in *B*'s suit was made. The property was again put up for sale and it was bought by *C*. *B* was then dispossessed and referred to a regular suit and *C* was put into possession. *B* then sued *C* to eject him and recover possession as first mortgagee and first purchaser, and it was held that *B* having bought the rights and interests of the mortgagor at a sale held prior to the sale at which *C* purchased, the mortgagor had no right or interest left to sell to *C*. As, however, *B*'s purchase was subject to *C*'s mortgage, who was not a party to *B*'s suit, *C*'s right as mortgagee was not affected by the sale to *B*, though effect could not be given to it in that suit. *B* was accordingly held to be entitled to possession as against *C*, until the latter should take the proper steps to enforce his mortgage (x).

One who has caused the property of his judgment-debtor to be sold in execution cannot afterwards set up any claim of his own against that property, unless he shows that the purchaser purchased with notice of his claim. So where a creditor obtained two decrees against his debtor, one being a mortgage-decree to enforce his lien on certain property, and the other a simple money-decree, and in execution of the second decree the property over which the judgment-creditor had a lien was sold and was purchased by a third party, and subsequently in execution of the first decree, at the instance of the judgment-creditor, the same property was advertised for sale, but on the auction-purchaser objecting, the judgment-creditor

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(x) *Venkatanarsamma v. Ramiah*, I.L.R. 2 Mad. 108.

brought a suit against him to enforce his lien on the property in the hands of the auction-purchaser, it was held that it lay on the plaintiff, in order to entitle him to recover in the suit, to show that the defendant purchased with notice of the lien, and further that the fact that for some purpose at some time or other the judgment-creditor informed the Court of the mortgage was not evidence of notice to the auction-purchaser (y).

It need scarcely be pointed out that a collusive and fraudulent mortgage gives the mortgagee no priority over a *bonâ fide* purchaser for value. And even if the mortgagee in such case has obtained a decree on his mortgage prior to the date on which the property has passed into the hands of the purchaser, the latter will not take it subject to the mortgage-decree (z).

A mortgagee who has himself purchased, at a sale in execution of a decree upon his mortgage, the right, title and interest of the mortgagor, cannot be considered as having put himself, by reason of his purchase, in a better position than he was in as mortgagee. Where, therefore, it was admitted that if plaintiff had claimed as mortgagee, he would have been estopped from asserting a title to the property as against certain parties, it was held that he did not, by purchasing the property at a sale in execution of a decree upon his mortgage, put himself in a better position as regards the estoppel (a).

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(y) *Nursing Narain Singh v. Roghoobur Singh*, I.L.R. 10 Calc. 609. See also *Tukaram bin Atmaran v. Ramchandra bin Budharam*, I.L.R. 1 Bom. 314 (referred to at p. 305 *supra*); and *Dullab Sircar v. Krishna Kumar Bakshi*, 3 B.L.R. 407; S.C. 12 W.R. 303; and *Doolee Chund v. Mussamut Oomda Begum*, 24 W.R. 263.

(z) *Gopi Wasudev Bhat v. Markande Narayan Bhat*, I.L.R. 3 Bom. 30.

(a) *Poreshnath Mukerji v. Anathnath Deb*, I.L.R. 9 Cal. 265. (P.C.)



In a case, which came before the Madras High Court, the facts were, that a mortgagee, after having obtained a decree on his mortgage, in execution of which he had himself purchased the mortgaged property, discovered that a portion of the mortgaged property had been acquired by a Railway Company under the Land Acquisition Act previous to the date of his suit, and that the compensation was lodged in the district treasury in the name of the mortgagor's mother. Having failed in an application for an order for payment of the sum to him, the mortgagee sued the mortgagor, as the sole heir of his mother, who had meantime died, for a declaration of right to, and to recover, the said sum. The defendant pleaded (among other things) that the land having been acquired by the Railway Company previous to the date of the mortgage-suit, the suit was barred by sec. 43 of the Code of Civil Procedure (Act X of 1877), but the Court held that the provisions of sec. 43 of the Code as to omitting a claim clearly involved the idea that the plaintiff so omitting was, at some time prior to the suit, aware or informed of the claim, or aware of the facts which would give him a cause of action, and therefore that, as the plaintiff did not at the time of his mortgage-suit know of the acquisition of the land by the Railway Company, his suit was not barred. Moreover, the defendant's mother having been alive at the date when the mortgage-suit was brought, the plaintiff would have had to sue her for a declaration of title and to recover the land, and, as the cause of action in this suit would have been entirely different from that against the mortgagee, the suit against the mother could not have been joined with the suit on the bond (b).

A mortgagee is entitled to enforce his security and bring

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(b) *Viraragava v. Krishnasami*, I.L.R. 6 Mad. 344.



the property to sale notwithstanding the death of his mortgagor and the pendency of an administration suit. So when a mortgagee had obtained a decree against the representative of his judgment-debtor and after the issue of the sale notification, but prior to the sale, one of the defendants applied to have the sale stayed, on the ground that an administration suit was pending with respect to the property of the mortgagor, and also asked that a receiver might be appointed and arrangements made for the purpose of paying off the mortgage-debt and thus saving the property from being sold, it was held that the Court had no right to pass such an order, and that there were no reasonable grounds why the mortgagee should be debarred from enforcing his security pending the administration suit (c).

In one case (d) it was suggested that where *A* has mortgages over two properties to secure one debt, and *B* has a second mortgage of only one of these properties, *B* has a right to insist that *A* shall proceed to realise his debt in the first instance from the other property, before attempting to realise it from the property which is subject to *B*'s mortgage. There does not, however, appear to be any case in which this principle, which is known in English law as the marshalling of securities, has been applied in the case of mofussil mortgages.

On the other hand it has been expressly held that the doctrine of marshalling does not apply as between a mortgagee and attaching-creditors of the mortgagor who hold

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(c) *Kristomohiny Dossee v. Bama Churn Nag Chowdry*, I.L.R. 7 Cal. 733.

(d) *Bishonath Mookerjee v. Kisto Mohun Mookerjee*, 7 W.R. 483. See also *Khetossee Cherooria v. Bane Madhub Doss*, 12 W.R. 114 and ante p. 326; and compare the Transfer of Property Act, 1882, sec. 81.

mere money decrees (*e*), or a subsequent purchaser who bought subject to existing incumbrances (*f*).

An estate was mortgaged to secure the payment of a certain sum. Another estate was by a subsequent deed mortgaged as a further security for the same sum. It was held that the mortgagee might proceed *first* against the estate which was *last* mortgaged to him, if he chose to do so (*g*).

When a person mortgages a larger share in a property than he is at the time of the mortgage entitled to, but subsequently, after the mortgagee has obtained a decree on his mortgage, becomes entitled to a share sufficient to cover the amount of the property contained in the mortgage, the mortgagee is entitled to enforce his decree against such property, and is not confined to the amount in the possession of the mortgagor at the date of the mortgage. Thus where *A* mortgaged a fourteen-anna share in a certain mouzah to *B*, and *B* obtained a decree on his mortgage-bond, but at the time of the mortgage *A* was only entitled to a twelve-anna share, though he subsequently became entitled by purchase from *B* to an additional two-anna share, it was held that *B* had an equitable right to demand that the whole fourteen-anna share should be held subject to his mortgage (*h*).

When property, which is subject to a mortgage, is sold by a third party in execution of a decree which he has obtained, and is sold expressly subject to the mortgage, and there is a surplus after satisfying the decree,—the mortgagee

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(*e*) *Kristodass Kundoo v. Ramkant Roy Chowdhry*, I.L.R. 6 Calc. 142.

(*f*) *Rama Raju v. Subbarayudu*, I.L.R. 5 Mad. 387. See also *Timmappa v. Lakshamma*, I.L.R. 5 Mad. 385; but compare *Mussamat Nowa Koer v. Sheikh Abdul Rohim*, W.R. 1864, p. 374; and *Toolsee Ram v. Munnoo Lall*, 1 W.R. 353.

(*g*) *Baboo Rajkishore Singh v. Bhunjun Roy*, S.D.A., 1858, p. 1176.

(*h*) *Deolie Chand v. Nirban Singh*, I.L.R. 5 Calc. 253.

will not be entitled to share in the surplus. This is enacted by sec. 271 of Act VIII of 1859 (i), a section which refers to a mortgagee who is also an execution-creditor. Thus a mortgagee of property, which in execution is sold subject to his mortgage, is not entitled to have the surplus proceeds paid out to him in satisfaction of a decree obtained on his mortgage, upon which decree he has issued execution (j).

A mortgagee got a simple money decree for the amount due to him. Another decree-holder attached and sold certain property, *other than that mortgaged*, of the judgment-debtor. After satisfying the decree-holder, a surplus remained. It was held that the mortgagee decree-holder was entitled to share with the other decree-holders who had attached, in a rateable distribution of this surplus (k).

When the mortgage debt is payable by instalments, and on default made in respect of one instalment the mortgagee attaches and sells (under the mortgage) the mortgaged property or a portion of it,—and there is a surplus after satisfying that instalment,—it has been held that the mortgagee has a lien on the surplus in respect of the future instalments, so that he can prevent its being distributed among the other (ordinary) attaching decree-holders, although the subsequent instalments are not due (l).

It has been held, however, that a mortgagee who chooses to waive his lien on the land may come in and share in

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(i) Compare sec. 295, cl. (A) of Act XIV of 1882.

(j) *Mirza Futeh Ali v. Gregory*, 6 W.R. (Misc.) 13.

(k) *Radha Kant Roy v. Mirza Sudafut Mahomed Khan*, 21 W.R. 86.

(l) *Ram Kant Chowdhry v. Brindaban Chunder Doss*, 16 W.R. 246. But see *Bank of Bengal (The) v. Nundolall Doss*, 12 B.L.R. 509; and *Umrao Lall v. Behari Singh*, I.L.R. 3 All. 297.

the surplus, notwithstanding sec. 271 of Act VIII of 1859 (*m*).

It has been held that the purport of secs. 270 and 271 of Act VIII of 1859 is not to alter or limit the rights of parties arising out of a contract, but simply to determine questions between rival decree-holders standing on the same footing, and in respect of whom there is no rule for determining the mode in which the proceeds of property sold in execution shall be distributed. Accordingly a mortgagee who had obtained a money decree, and who was dissatisfied with an order for distribution made under sec. 271, was allowed to sue to recover from the other creditors the money which he alleged to have been wrongly paid to them under the order (*n*). And the same principle has been applied in construing sec. 295 of the present Code (Act XIV of 1882), which contains a proviso that when any property liable to be sold in execution of a decree is subject to a mortgage or charge the Court may, with the assent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold. It has been held that omission or neglect on the part of the Court executing the decree to give specific directions as prescribed in this proviso does not prejudice the rights of an unsatisfied mortgagee or discharge his incumbrance. In the case in which this

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(*m*) *Purmessuree Dossee v. Nobin Chunder Tarun*, 24 W.R. 305 ; *Fukeer Buksh v. Chutturdharee Chowdhry*, 14 W.R. 209. See contra *Bromomoyee Debia v. Boykunt Chunder Gungopadhya*, 5 W.R. (Misc.) 52.

(*n*) *Hasoon Arra Begum v. Jawadoonmissa Satooda Khandan*, I.L.R. 4 Calc. 29. See also *Raj Chunder Shaha v. Hur Mohun Roy*, 22 W.R., 98.

ruling was given two mortgagees, in execution of their several decrees, attached the same property, of which a moiety without further specification was respectively mortgaged to each of them, and subsequent to the attachment the property was sold in execution of one of the decrees, and it was held that, notwithstanding the whole interest of the mortgagor was intended to be sold, the purchaser took one of the moieties subject to the lien of the unsatisfied mortgagee (o).

The Allahabad Court has held (p) that a decree for the sale of ancestral land or of an interest in such land in enforcement of an hypothecation on such land is a decree for money within the meaning of the rules (q) prescribed by the local Government under sec. 320 (r) of the Code of Civil Procedure, but that effect cannot be given to those rules unless the order for sale has been made on or after the 1st October 1880 (s).

A sale by a mortgagee in execution of a decree obtained by him on his mortgage is not void because the mortgagor has died before it takes place, and his legal representatives are not made parties to the execution proceedings (t).

A talookdar mortgaged his tenure to his zemindar. Failing to pay his rent, the zemindar sued him under Act X of 1859, and got a decree, and sold the tenure in execution. The auction-purchaser got possession. The zemindar then sued and got a decree for the debt due on his mortgage bond, and sought to enforce his decree by again

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(o) *Janoky Bullubh Sen v. Johiruddin Mahomed Abu Ali Soher Chowdhry*, I.L.R. 10 Calc. 567. See also *Stowell v. Ajudhia Nath*, I.L.R. 6 All. 255 (cf. p. 258 per Oldfield, J.)

(p) *Birch v. Rati Ram*, I.L.R. 4 All. 115.

(q) See N.-W.-P. and Oudh Gazette, 9th October 1880, p. 990.

(r) As to the provisions of this section, see *ante* pp. 34-36.

(s) *Hafiz-un-nissa v. Mahadeo Prasad*, I.L.R. 4 All. 116.

(t) *Stowell v. Ajudhia Nath*, I.L.R. 6 All. 255.

selling the tenure. But it was held that he could not do so: that the sale under the rent-law passed the tenure free from incumbrances: and that the mortgage on it was no longer in existence (u).

The patnidar of a talook, who had granted a darpatni, afterwards mortgaged the patni talook, and the mortgagees obtained a decree on their mortgage, but before executing such decree the patni was sold for its arrears of rent. After payment of rent and expenses there remained a surplus in the hands of the Collector, which the mortgagees attached in execution of their decree. Subsequently the durpatnidar instituted a suit against the patnidar under cl. 5, sec. 17, Ben. Reg. VIII of 1819 for compensation for loss of his durpatni, and obtained a decree which directed that it be satisfied out of the surplus sale proceeds in the hands of the Collector. That decree being satisfied, although the attachment by the mortgagees was subsisting, the latter instituted a suit against the durpatnidars to recover the amount, but the Court held that the durpatnidar's decree should be satisfied out of the surplus sale proceeds in priority to the mortgagee's decree, notwithstanding the attachment, on the ground that under cl. 5 of sec. 17 the only remedy provided was by way of a regular suit, which the mortgagees had not seen fit to avail themselves of (v).

A mortgagee was in possession under his mortgage, and a subsequent mortgagee got a decree to sell the property, but subject to the first mortgage. In execution of this decree, peons and other officers of the Court went and took actual possession in order to attach the property, as a step towards judicial sale. The Privy Council held that this was illegal: that no actual seizure should have been made:

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(u) *Kalee Kant Chowdhry v. Rumonee Kant Bhuttacharjee*, 3 W.R. 217. See also *ante* pp. 273 *et seq.*

(v) *Swinomoye Dassya v. The Land Mortgage Bank*, I.L.R. 7 Cal. 173.

and that the proper course was to issue and publish a written notice under secs. 235 and 239 of Act VIII of 1859 (w).

In one case the mortgaged lands were, at the time when they were sold to the mortgagee in execution of a decree upon his mortgage, in the occupation of the mortgagor's tenants under an agreement to give to him a moiety of the crops. The mortgagee allowed the mortgagor to remain in possession of the lands after the date of the sale, and another judgment-creditor of the mortgagor attached the crops which had been cut and stored by the mortgagor's tenants since the date of the sale. On an application by the mortgagee to have the attachment removed, the Bombay High Court directed its removal, holding that, though, while the crops were in the hands of the tenants, they were held subject to a lien for the rent or share due to the mortgagor, this lien, arising entirely from the mortgagor's position towards the tenants in relation to the land, was a part of his right, title and interest in the land, which had passed by his purchase to the mortgagee, and could be asserted by him so long as the crops had not been carried away, or come into the possession of purchasers for value from the tenants or from the mortgagor (x).

According to the practice formerly prevailing in the mofussil Courts a mortgagee might become the purchaser of the land for the sale of which he had obtained an order, so long as no case of fraud or collusion was made out against him. But the Civil Procedure Code of 1877 altered the law, and now no mortgagee, who holds a decree on his mortgage

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(w) *Mudhun Mohun Doss v. Gokul Doss*, 10 Moore's I.A. 563; S.C. 5 W.R. (P.C.) 91.

(x) *Land Mortgage Bank of India v. Vishnu Govind Patankar*, I.L.R. 2 Bom. 670; and compare *Afatoonla Sirdar v. Dwarka Nath Moitry*, I.L.R. 4 Calc. 814.



in execution of which property is sold, may, without the express permission of the Court, bid for or purchase the property (y); and this is in accordance with the law in force in England, where a mortgagee can become the purchaser, only by special leave of the Court. It has been held that under this provision the holder of a decree, in execution of which a property is sold, is absolutely bound to have express permission from the Court before he can purchase the property, and whether an objection is taken and pressed or otherwise, a sale to him is invalid, unless he has got explicit permission (z).

But a mortgagee, who has purchased without permission, cannot take advantage of his own wrong to throw his purchase up. Thus where a mortgagee, who had purchased property under a decree without permission, failed to deposit the earnest money in consequence of which the property was resold for Rs. 125 less than what had been bid by the defaulting purchaser at the first sale, and the mortgagor sued the mortgagee, the first purchaser, for Rs. 125, upon the ground that he had been a loser to that extent by reason of his default, the Bombay High Court held that the mortgagee could not plead as a defence that he had purchased without the permission of the Court, and that his purchase was consequently void (a).

Under Act X of 1877 a regular suit was the only remedy which a mortgagor, who wished to set aside a purchase

(y) See Acts X of 1877 and XIV of 1882, sec. 294.

(z) *Rukhinee Bullubh v. Brojonath Sircar*, I.L.R. 5 Calc. 308.

(a) *Javherbai v. Haribhai*, I.L.R. 5 Bom. 575 as explained in *Mahomed Gazee Chowdhry v. Ram Loll Sen*, I.L.R., 10 Calc. 757. Notwithstanding the remarks in this case, the Calcutta and Bombay decisions above referred to would appear to be at variance, inasmuch as it was held by the former that the sale was absolutely void, but by the latter that it was only voidable at the option of the mortgagor, or of somebody who was interested in setting it aside.

made by a mortgagee without the permission of the Court, could take, but under the present Code (b), he can, if he chooses, by a summary application, not only have the sale set aside, but he may also recover the costs of the application, and any deficiency in the price which may happen on the resale, and all expenses attending it. This was pointed out by the Calcutta High Court in a very recent case (c), in which a mortgagee decree-holder, who had asked for but was refused leave to bid at the sale, notwithstanding such refusal purchased the property in the name of a third person, and then, possession being opposed, brought a suit as purchaser for possession of the property, and the Court held that as the plaintiff had been guilty of an abuse of the process of the Court, in bidding at the sale and buying the property benami, his sale ought not to be enforced.

In one case which came before the Calcutta High Court in its Original Civil Jurisdiction, where a second mortgagee had made a third mortgagee a party to his suit against his mortgagor for an account and sale, the Court directed an account to be taken, not only of what was due to the plaintiff, but also of what was due to the third mortgagee (d).

It may be observed that a mortgagee by obtaining a mere money-decree may be held seriously to affect his lien on the mortgaged property. For, supposing the mortgage to carry interest at a rate higher than the Court rate,—as after the money-decree his debt would carry interest only at the rate allowed by the Court, it is probable that his lien would continue only for the same rate (e).

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(b) See sec. 294, last clause.

(c) *Mahomed Gazeer Chowdhry v. Ram Loll Sen*, I.L.R. 10 Calc. 757.

(d) *Auhindro Bhoosun Chatterjee v. Chunnoololl Johurry*, I.L.R. 5 Calc. 101.

(e) *European Central Railway Company*, In re, ex parte *Oriental Financial Corporation*, L.R. 4 Ch. D. 33; and see the remarks of *Pontifex, J.*, in the argument in *Jonmenjoy Mullick v. Dossmoney Dossee*, I.L.R. 7 Calc. 714.

II. In a case of mortgage by *bye-bil-wufa*, *kut-kub-ala*, or *conditional sale* (*f*), foreclosure cannot be obtained, in provinces in which the Bengal Regulations are in force, until certain forms prescribed by law have been gone through; and these forms must be strictly complied with, any failure in this respect proving fatal to the whole proceeding.

The law on the subject, as established by the Regulations and the practice of the Courts in Bengal, is thus summed up by the Privy Council in the case of *Forbes v. Ameeroonissa Begum* (*g*): "Up to the year 1806, the rights of the holder of a *bye-bil-wufa* were enforceable according to the strict terms of the contract. It was necessary for the mortgagor, if he wished to save his estate from forfeiture, to tender the amount due, or to pay it into Court, pursuant to the provisions of Regulation I of 1798 (*h*), within the stipulated period for the repayment of the loan. Regulation XVII of 1806 (*i*) first introduced a modification of the strict rights given by the contract, analogous to, though by no means identical with, that which Courts of Equity have long imposed on mortgagees in this country. The 7th section of that Regulation extended the period within which the mortgagor might redeem, to any time within one year from and after the application of the mortgagee to the Zillah Court under the following section. And that section, being the 8th, provided that a mortgagee, desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period, or at any

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(*f*) For the remedies of a mortgagee by conditional sale under the Transfer of Property Act, 1882, see secs. 67, 86 and 87 of that Act.

(*g*) 10 Moore's I.A. 340; S.C. 5 W.R. (P.C.) 47.

(*h*) This Regulation applied in the first instance only to Bengal, Behar, Orissa, and Benares, but was extended to the provinces ceded by the Nawab Vizier by Ben. Reg. XXXIV of 1803, secs. 12—15.

(*i*) This Regulation extends to every place to which Ben. Reg. I of 1798, as extended by Ben. Reg. XXXIV of 1803, extends.

time subsequent before the sum lent was repaid, should, after demanding payment from the borrower or his representatives, apply for that purpose by a written petition to the Zillah Judge, who should cause the mortgagor to be furnished with a copy of the application, and notify to him, that if he did not redeem the property in the manner provided by the preceding section, within one year from the date of the notification, the mortgage would be finally foreclosed and the conditional sale made absolute. Hence, when these proceedings have been had, it becomes incumbent on the mortgagor to take, within the year, the steps towards redemption which are prescribed by the 7th section. Within that period, he must either pay or tender (and the proof of such payment or tender will lie on him) the sum lent, or the balance due if any part of the principal has been discharged, and also in the case in which the mortgagee has not been put into possession of the mortgaged property, any interest that may be due; or (and this is the alternative commonly adopted) he must make a deposit pursuant to sec. 2 of Regulation I of 1798. That enactment, of which the object was to relieve mortgagors seeking to redeem, from the difficulties of proving a tender, by enabling them to pay the proper amount into Court, thus prescribes what the deposit is to be:—‘When the lender has not obtained possession of the lands, the deposit is to be the principal sum lent with the stipulated interest thereon; but if the lender has held possession of the land, the principal sum borrowed need only be deposited, leaving the interest to be settled on an adjustment of the lender’s receipts and disbursements during the period he has been in possession. In either of these cases, the deposit preserves to the borrower his full right of redemption, and entitles him to immediate possession of the land, if that is in the

possession of the lender, subject to the adjustment of the accounts.' A third case is then provided for as follows:— 'If the borrower in any case shall deposit a less sum than above required, alleging that the sum deposited is the total sum due to the lender for principal and interest after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and notice given to the lender as above directed, and if the amount so deposited be admitted by the lender, or be established on investigation to be the total amount due to him, the right of redemption shall be considered to have been fully preserved to the borrower, who will not, however, in such cases be entitled to the recovery of the lands until it be admitted or established that he has paid the full amount due from him.' The 3rd section prescribes the manner in which the lender is to account in those cases in which an account shall be necessary. The general effect of the Regulations is, that if anything be due on the mortgage and the mortgagor makes an insufficient deposit, and *à fortiori* he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace. The title of the mortgagee, however, is not even then complete. It was ruled by the Circular Order of the 22nd July 1813, No. 37, and has ever since been settled law, that the functions of the Judge under Regulation XVII of 1806, sec. 8, are purely ministerial, and that a mortgagee, after having done all that this Regulation requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession. In that suit the mortgagor may contest on any sufficient grounds the validity of the conditional sale, or the regularity of the proceedings taken under the Regulation in order to make it absolute.

He may also allege and prove, if he can, that nothing is due, or that the deposit (if any) which he has made is sufficient, to cover what is due; but the issue, in so far as the right of redemption is concerned, will be, whether anything at the end of the year of grace remained due to the mortgagee, and, if so, whether the necessary deposit had then been made. If that is found against the mortgagor the right of redemption is gone."

Where a mortgage-deed contained a provision that in the event of the principal sum not being repaid within seven years, the time limited by the deed, the conditional sale should become absolute, it was held that that did not dispense with the necessity of compliance with the provisions of sec. 8 of Ben. Reg. XVII of 1806 (*j*). In the same case it was also held that a provision by which, in default of the payment of the stipulated interest at any time when it was due during the subsistence of the term for which the mortgage lasted, the conditional sale was to become absolute, was in effect to defeat and violate the provisions of that Regulation; that the proceedings taken by the mortgagee to foreclose before the expiry of the full term allowed by the deed were irregular, and that the sale could only be rendered conclusive in the manner prescribed by the Regulation after the full term had expired.

The first thing (*k*) to be done by a mortgagee by conditional sale wishing to foreclose, that is to say, to have the sale to him declared absolute, is to demand payment of what is due on the mortgage from the borrower or his representative (*l*). And it has been held that where no such

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(*j*) *Imdad Husain v. Mannu Lal*, I.L.R. 3 All. 509. See *ante* p. 445.

(*k*) Ben. Reg. XVII of 1806, sec. 8.

(*l*) *Forbes v. Amceroonissa Begum*, 10 Moore's I.A. 340; S.O. 5 W.R. (P.C.) 47.

demand is made all the proceedings subsequently taken to enforce foreclosure are invalid and ineffective (*m*).

In the latter of these cases the judgment of the Court contained the following observations (*n*): "It appears to us that the section" (sec. 8 of Ben. Reg. XVII of 1806) "contemplates a previous demand of payment, and the non-compliance therewith as a kind of cause of action for commencing foreclosure proceedings, and that the demand must therefore necessarily be made before the mortgagee has the right of applying for foreclosure, and it follows that the omission to make such a demand would vitiate the foreclosure proceedings altogether. We are fortified in placing such a construction upon the section by the language of the preamble of the Regulation, which clearly shows that it was passed for the protection of the mortgagors and for imposing restrictions upon the power formerly possessed by *bye-bil-wufa* mortgagees in respect of foreclosure."

But it is not necessary that the demand should be for the specific sum ultimately ascertained to be due (*o*), and it is not competent for a Court, which dismisses a suit on the ground that the foreclosure proceedings were invalid, to put any limitation on the amount to be demanded by the mortgagee prior to a fresh application for foreclosure (*p*).

If the application is unsuccessful, the mortgagee must present a written petition to the Judge of the district in which the mortgaged property is situated, stating that he is mortgagee by conditional sale of the property in

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(*m*) *Behari Lal v. Beni Lal*, I.L.R. 3 All. 408; and *Karan Singh v. Mohan Lal*, I.L.R. 5 All. 9.

(*n*) *Karan Singh v. Mohan Lal*, I.L.R. 5 All. 9 (*cf.* p. 10.)

(*o*) *Forbes v. Ameeroonissa Begum*, 10 Moore's I.A. 340; S.C. 5 W.R. (P.C.) 47.

(*p*) *Behari Lal v. Beni Lal*, I.L.R. 3 All. 408.



question, that a certain sum is due to him for principal, with a sum for interest and costs, that the petitioner has made a demand for payment but without effect, and that therefore he wishes to have his sale made absolute, to be put in possession, and to be registered as proprietor.

On receiving this petition, the Judge will cause the mortgagor or his legal representative to be furnished as soon as may be with a copy of it, and also with a notice or *perwannah* under his seal and official signature, notifying to him, that if he does not redeem the property mentioned in the petition within one year, the mortgage will be finally foreclosed, and the conditional sale made absolute.

It has been held that a notice, which does not bear the signature of the Judge, but bears the seal of his Court only, is informal and bad, and the foreclosure proceedings in which such a notice has issued are invalid *ab initio* (q).

The Judge will act upon the petition of one who professes to be the mortgagee of property within his jurisdiction, without making any inquiry as to the truth of its contents, or even as to the existence of a mortgage at all. And the production of the original deed of mortgage, prior to the issue of notice of foreclosure, is not necessary (r). Nor need the mortgagee produce his accounts in these preliminary proceedings (s). But a Judge may if he pleases satisfy himself, by requiring the production of the document, that the applicant for foreclosure is the "receiver or holder of a deed of mortgage" (t).

A copy of the mortgagee's application to foreclose must accompany the notice issued by the Judge to the mortgagor

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(q) *Basdeo Singh v. Mala Din Singh*, I.L.R. 4 All. 276.

(r) *Baboo Gopal Lal Thakoor*, Petitioner, Rep. Sum. Cases, 8th September 1840.

(s) *Forbes v. Ameeroonissa Begum*, 10 Moore's I.A. 340 ; S.C. 5 W.R. (P.C.) 47.

(t) Cir. Ord., 5th June 1848, 831, 46.

or his representative; but it is not required that he should be served with a copy of the mortgage agreement (*u*).

And the foreclosure is not complete, and the Courts will not give effect to it, unless a copy of the mortgagee's written application has been properly served on the mortgagor (*v*). In one case, however, it was held that when the mortgagee had been some years in possession after foreclosure, the mortgagor, who had full notice of the fact, could not come in and redeem, on the allegation that the proceedings were irregular inasmuch as a copy of the mortgagee's petition was not served along with the notice. The irregularity was taken to have been waived (*w*).

In a late case the question, whether the provisions of sec. 8 of Ben. Reg. XVII of 1806 with respect to the service of a copy of the mortgagee's application to foreclose along with the Judge's perwannah, were imperative or merely directory, was very fully argued and a number of authorities cited to show that they were merely directory. The Court, however, held that they were imperative and that it lay on the mortgagee seeking to foreclose to fully prove that they had been complied with, and that, as in that case the evidence fell short of proof that a copy of such application had been served with the perwannah, the plaintiff's suit, which was to obtain possession of the mortgaged premises after the expiry of the year of grace, must necessarily fail (*x*). The Privy Council have also laid down that in an action brought to recover possession as upon a

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(*u*) Cons. 630, 11th March, No. 1.

(*v*) *Santee Ram Jana v. Modoo Mytee*, 20 W.R. 363; *Dinonath Gangooly v. Nursing Pershad Doss*, 22 W.R., 90.

(*w*) *Saligram Tewaree v. Beharee Misser*, W.R., 1864, p. 36.

(*x*) *The Bank of Hindoostan, China and Japan v. Shoroshibala Debee*, I.L.R. 2 Calc. 311.

a foreclosure, it is necessary for the plaintiff to satisfy the Court that the conditions of Ben. Reg. XVII of 1806 have been complied with as regards service of a copy of the mortgagee's petition and the service must be proved by evidence, the mere return of the nazir on the back of the Judge's perwannah to the effect that the mortgagor had been duly served not being legal evidence of the service (y).

The notice from the Judge to the mortgagor must issue from the Court of the district in which the mortgaged property is situated at the time of issue : and if this rule is not attended to, all the subsequent proceedings will be bad (z). But it appears that when the lands lie in several zillahs, a notice applicable to the whole lands, but issued from only one of the Courts which have jurisdiction, is sufficient ; and it is not necessary either that a separate notice should issue from each one of the Courts, or that leave should be obtained from the High Court to issue one notice which may suffice for all the property in dispute. In the case of *Ras Muni Dibiah v. Pran Kishen Das* (a), the mortgage-deed on which the suit was founded, described the whole lands as situated in zillah Moorshedabad, and out of the Court of that zillah notice of foreclosure was issued. The Collector was a party to the suit, and objected that part of the lands being in zillah Beerbhoom, the notice was incomplete. To this the mortgagee pleaded an order, of date subsequent to the notice, obtained by him from the Sudder Court, for the trial of the cause in the Court of Moorshedabad. Upon these facts, the Privy Council in giving judgment remark :—

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(y) *Norender Narain Singh v. Dwarka Lal Mundur*, I.L.R. 3 Cal. 397.

(z) *Bijnath Pal v. Rajah Muhtab Chundur*, S.D.A., 1847, p. 485. Ben. Reg. XVII of 1806, sec. 8.

(a) 4 Moore's I.A. 392 ; S.C. 7 W.R. (P.C.) 66. See also *Ramdyal Tewaree v. Rewutteeeram*, S.D.A., 1859, p. 848.

"What is there to show in the whole course of these proceedings, that these lands were not situated partly in one and partly in the other district; and what is there to show in the course of the proceedings, that if that were the case an order (*i.e.*, notice of foreclosure) made in the Court of either district, would not be a proper order? We think that there is nothing in this case to show that the order was not made in a proper Court."

Following this ruling the Allahabad Court has held that, where the mortgaged land was situate partly in the district of Shahjahanpur, in the N. W. P., and partly in the district of Kheri, in the Province of Oudh, and the mortgagee applied to the District Court of Shahjahanpur to foreclose, the circumstance that Oudh was in some respects a distinct province from the N. W. P. did not take the case out of the operation of that ruling, inasmuch as Ben. Reg. XVII of 1806 was in force in Oudh as well as in the N. W. P. at the time of the foreclosure proceedings (*b*).

Judges are required to pay particular attention to prevent any unnecessary delay in issuing these notifications. The mortgagee therefore, on filing his application, should be directed immediately to deposit the *tulubana*h of the person through whom the notice is to be issued to the other party, that the order for issuing the same may be passed without delay.

The period of one year, during which the mortgagor may redeem, must be calculated from the "date of the notification" (*c*). It used to be held that the year allowed by law, counted from the date of issue of the notice, not from the date of *service* on the mortgagor. Thus, the date of issue being the 28th May 1841, and the date of service

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(*b*) *Surjan Singh v. Jagan Nath Singh*, 1.L.R., 2 All., 313.

(*c*) Ben. Reg. XVII of 1806, sec. 8.

the 17th June, the year counted from the 28th May (d). So that if the notice of foreclosure were not served on the mortgagor until the last day of the year of grace, he would have no time at all left him for redemption.

But this is no longer so, the former decisions on the question having been expressly overruled in 1868 by a Full Bench,—*Peacock*, C.J., observing, “there would be but little equity in allowing a mortgagor to redeem his estate within one year from the date of a *perwannah* not served upon him, or of which he should have no notice at all, or no notice until the period of one year from the date of the *perwannah* should have actually expired or be upon the eve of expiration. I apprehend that the Legislature intended that the mortgagor should have one year to redeem from the time at which it should be made known to him that the mortgagee had applied to foreclose”. (e); and this interpretation of the section has now received the sanction of the Privy Council (f). Whatever therefore may have been the effect of decisions previous to that in *Mahesh Chandra Sen v. Tarini* (g) there is now no question that the year of grace runs from the date of the service of the notice and not from the date of its issue by the Judge.

Notice is to be given to the mortgagor or “his legal representative.” These words are to be strictly construed, and care must be taken that all proper parties have had

(d) *Kunhya Lal Thakoor v. Ras Munee Dossea*, 7 Sel. Rep. 264; S.C. S.D.A., 1846, p. 279; *Abdool Hamed v. Saha-oon-nissa Beebee*, S.D.A., 1858, p. 627; S.C. on review S.D.A., 1858, p. 1477; *Suroop Chunder Nag v. Bonomalee Pundit*, 9 W.R. 116. See also *Kishen Bullubh Mukta v. Belasoo Commur*, 3 W.R. 230.

(e) *Mahesh Chandra Sen v. Tarini*, 1 B.L.R. (F.B.) 14; S.C. 10 W.R. (F.B.) 27.

(f) *Norender Narain Singh v. Dwarka Lal Mundur*, I.L.R. 3 Calc. 397.

(g) 1 B.L.R. (F.B.) 14; S. C. 10 W.R. (F.B.) 27.

notice. When there are several mortgagors and it is not sought to foreclose the individual shares of each as against each, but to foreclose the whole estate as upon one mortgage, one debt and one entire right against all, service of the notice upon some only of the mortgagors is insufficient to warrant the foreclosure of the whole estate or of any part of it (*h*). In that case, however, the Privy Council pointed out that there might be cases of mortgages of separate shares in which by proceedings properly framed foreclosure might take place in respect of some of such shares only.

It is also the duty of the mortgagor when he seeks to foreclose to discover and serve the notice on those who are the then owners of the estate (*i*).

Notice to the person who on the face of the deed appears to be the mortgagor, or to his representative, is all that is required : and a change during the year of grace, in the parties entitled to redeem, does not make any further notice necessary. Thus if *after* notice has been duly served on the mortgagor, he transfers his interest, no fresh notice need be given to the transferee (*j*). So also, if *after* due service of the notice the mortgagor on whom it was served becomes insolvent and files his schedule in the Insolvent Court, no further notice is necessary (*k*). When *A* mortgaged land, *B* witnessing the deed, but being in reality a co-mortgagor with *A*, it was held that notice to *A* was sufficient, although the mortgagees were cognisant of the

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(*h*) *Norender Narain Singh v. Dwarika Lal Mundur*, I.L.R. 3 Calc. 397.

(*i*) *Ibid.*

(*j*) *Baboo Goordial Singh v. Ramsuhaye Singh*, S.D.A., 1857, p. 957.

(*k*) *Bholanath Singh Roy v. Baneemadhub Banerjee*, S.D.A., 1858, p. 323.

fact that *B* also was in truth a mortgagor (*l*). So it would seem that *A* having mortgaged lands in the name of his son *B*, notice to *B* would be considered sufficient: and that this notice, having been served during *A*'s lifetime, would be binding upon other parties who, along with *B*, had on *A*'s death during the year of grace become his "legal representatives" (*m*).

If the mortgagor is dead, the notice must be served on his legal representative: and it is not enough to serve one who is in possession as legal representative but who afterwards turns out not to be the true heir (*n*).

There formerly was some uncertainty as to how far subsequent assignees of the mortgagor were his representatives so as to require notice to be served on them (*o*).

But there can now be no doubt that notice must be given to every one who (by whatever means) has come, *before* the issue of notice, to occupy the position of the mortgagor relative to the mortgagee, in respect of the property the subject of the mortgage. In one case it was said (*p*)—

(*l*) *Ramgopal Sen v. Rajkishore Bul*, S.D.A., 1849, p. 36. See also *Bhowannychurn Kahalee v. Goorooopersaud Roy*, S.D.A., 1856, p. 923.

(*m*) *Petition No. 49 of 1852*, S.D.A., 1852, p. 423.

(*n*) *Kalee Koomar Dutt v. Pran Kishoree Chowdhraim*, 22 W.R. 168. See also *Ram Chunder Halder v. Jonab Ali Khan*, 17 W.R. 230.

(*o*) *Jyesunkur Chund v. Zummeeroodeen*, S.D.A., 1847, p. 499; *Deverinns v. Campbell*, S.D.A., 1853, p. 859; *Baboo Prannath Chowdree v. Rooknee Begum*, S.D.A., 1854, p. 1; *Sheikh Amudee v. Chahut-oonnissa*, S.D.A. N.W.P., 1851, p. 210; *Mussumat Asima Beebee v. Sheikh Ahmudee*, S.D.A. N.W.P., 1854, p. 1; *Chowbey Hurbuns Ras v. Chowdree Petum Singh*, S.D.A., N.W.P., 1854, p. 371; *Ameer-ollah Khan v. Lalmun*, S.D.A. N.W.P., 1854, p. 421; *Goorooopersaud Jahah v. Bipproopersaud Berrah*, Marsh. 292.

(*p*) Per Phear, J., in *Kishen Bullubh Muhta v. Belasoo Commur*, 3 W.R. 230. See also *Bissonath Singh v. Brajonath Doss*, 6 W.R. 230.



"what is the meaning of the term 'mortgagor's legal representative? I conceive the words naturally designate that person who, either by law or by contract between the parties, succeeds the mortgagor, whether mediately or immediately, in the position which he holds relative to the mortgagee in respect of the property which is the subject of the mortgage; and with this view I believe all the published decisions of this Court accord, as well as those of the late Sudder Court. Now a succession of this kind may occur either by reason of the death of the mortgagor or by assignment of the equity of redemption, as a consequence of insolvency, execution of a decree of Court, or voluntary contract: only it should be observed that in the latter cases the assignment must not be inconsistent with the terms of the original mortgage, and must generally be assented to by the mortgagee, or, in other words, must be such as the mortgagee is bound to recognize. When the mortgagee desires to foreclose, there can never be the least practical difficulty in ascertaining whether the equity of redemption, as against the mortgagee, is in the hands of the original mortgagor himself, or in those of one of the substitutes for him just described; and in whichever of these it is found to be, to that one, in my judgment, the notice must be issued in order to initiate the year of grace, whether it was by public or private sale, or otherwise, that the assignee in question obtained his right to the assignment. But when once the time of grace is set running, no subsequent assignment of the equity of redemption will stop it. If, therefore, in the case before us, the equity of redemption was duly and completely assigned in such a way as to bind the mortgagee *before* the notice of foreclosure, then the notice is not sufficient, which has not been issued to the assignee; but, if the assignment took place *after* the notice to the mortgagor, then no notice to the assignee is necessary,

and the mortgagee ought to have the benefit of his proceedings."

In the case of *Mohun Lall Sookool v. Goluck Chunder Dutt* (q) the mortgagees when they issued their notice of foreclosure, not only had notice that the interest of the original mortgagor had been attached in execution, but were actively disputing the right of the decree-holders to put up that interest for sale. There had been a decision against their objections, and their appeal against that decision was pending. The appeal was decided against them on the 8th of January, and the equity of redemption was sold to the appellants on the 7th of April 1851. The Privy Council held it was clear that if the sale had taken place before the notice of foreclosure was filed, that notice, to be effectual, must have been served on the purchaser: and that in the circumstances above stated, it ought to have been served upon the decree-holder.

A purchaser from the mortgagor completed and registered his purchase on the very day on which the notification was made over to the peon for service. It was held that he was the legal representative of the mortgagor and as such ought to have been served. But in this case it was clear that the mortgagee had notice of the transfer: for he was actually an attesting witness to the mortgagor's signature of the deed of conveyance to the purchaser (r).

The term mortgagor's "legal representative" used in the Regulation was intended to apply to all or any persons who, at the date of the notice, possess a title to the equity of

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(q) 10 Moore's I.A. 1 (cf. p. 14); S.C. 1 W.R. (P.C.) 19. See also *Bhanoomutty Chowdhraïn v. Premchand Neogee*, 15 B.L.R. 28; *Sheo Golam Singh v. Ramroop Singh*, 15 B.L.R. 34 (note); *Ganga Gobind Mandal v. Bani Madhab Ghose*, 3 B.L.R. (a. c. j.) 172.

(r) *Sheo Golam Singh v. Ram Roop Singh*, 23 W.R. 25.

redemption, whether absolute or defeasible, under the mortgage. So a second mortgagee is entitled to be served with the notice of foreclosure, in order that he may have an opportunity of coming in to redeem the mortgage sought to be foreclosed, and thus be enabled to preserve his own security (s). But he would not be so entitled if the second mortgage was made during the pendency of the foreclosure proceedings (t).

So also the holder of a money-decree, who has attached land belonging to his judgment-debtor while it is subject to a conditional mortgage, does not thereby become the legal representative of the mortgagor and entitled to notice (u). Similarly the holder of a prior lien on the land is not entitled to notice, as he is not entitled to redeem the subsequent conditional mortgage (v).

It has recently been held that the holder of a mourasi mokurari patta, under the mortgagor, is not a "representative" within the meaning of the Regulation, and is therefore not entitled to notice of foreclosure, because he is not entitled to redeem (w).

When the mortgagor's representative was a minor, and notice was served on certain persons who were believed to be, but who were not in fact his guardians, the notice was

(s) *Dirgaj Singh v. Debi Singh*, I.L.R. 1 All. 499. See also *Nudyar Chand Chuckerbutty v. Roop Dass Banerjee*, 22 W.R. 475.

(t) *Balaji Ganesh v. Khusalji*, 11 Bom. H.C. 24; *Gulabchand Manikchand v. Dhondi valad Bhau*, 11 Bom. H.C. 64; *Baboo Goordial Singh v. Ramsuhaye Singh*, S.D.A., 1857, p. 957; *Bholanath Singh Roy v. Baneemadhub Banerjee*, S.D.A., 1858, p. 323.

(u) *Radhey Tewari v. Bujha Misr*, I.L.R. 3 All. 413.

(v) *Ibid.*

(w) *Sripoti Churn Dey v. Mohip Narain Singh*, I.L.R. 9 Cal. 643; following *Lalla Doorga Pershad v. Lalla Luchmun Sahoy*, 17 W.R. 272; but see *supra* p. 330.

bad (x). A mortgagor by deed directed that his widow should possess his zemindary (half of which was under mortgage), and enjoy it during her lifetime: he granted permission to her to adopt a son, and directed that on her death, such adopted son should inherit all his property: and he desired her to pay off his mortgage-debt, by selling or mortgaging any portion of his zemindary. Under this authority, the widow did adopt a boy as son to her deceased husband. The adopted son was a minor, and under the guardianship of the widow. Service of notice of foreclosure on the widow, was held to be sufficient, without notice to the son (y).

When the estate is under the control of the Court of Wards, by which a guardian and manager is put in possession, notice ought to be served on such guardian and manager; and the Collector of the district, as representing the Court of Wards, should be a party to the proceedings. If a new manager or guardian is appointed after issuing the notice, he must be substituted for the original one in all future proceedings (z).

Personal service on the mortgagor, of the notice of foreclosure, is not absolutely necessary. The service should of course be personal, if possible. If it be impossible, the notice must be served in such manner as the law would require any other process of the Court to be served under

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(x) *Cheydee Lall v. Mussumat Choonnya*, S.D.A. N.W.P., 1851, p. 278; *Ram Baksh Singh v. Mohunt Ram Lall Doss*, 21 W.R. 428; *Kalee Koomar Dutt v. Prankishoree Chowdhraim*, 22 W.R. 168.

(y) *Ras Muni Dibiah v. Prankishen Das*, 4 Moore's I.A. 392; S.C. 7 W.R. (P.C.) 66.

(z) *Ibid*; and see *Prannath Roy Chowdry v. Rookea Begum*, 7 Moore's I.A. 323; S.C. 4 W.R. (P.C.) 37.

similar circumstances (a). In one case the Court said,—“the notification is not merely a preliminary proceeding leading up to a judgment of foreclosure to be subsequently pronounced in Court. It not only fixes the date from which the period during which the mortgagor is to retain the right to redeem is to be computed, but it is of itself the operative act in the foreclosure proceeding. We think, therefore, that the service of the notice must be evidenced by the clearest proof, and must in all cases be, if not personal, at least such as to leave no doubt on the mind of the Court, that the notice itself must have reached the hands, or come to the knowledge of the mortgagors. Not only do we find from the evidence of the witnesses that the notice was not duly served, but we find that, up to the present time, the mortgagee has continued to pay in the Government revenue in her capacity as mortgagee, and designated herself as such in her *chalans*. Now, had the foreclosure been actually completed, it is most improbable that she would have failed to have her name entered as proprietor in the Collector’s register” (b).

The Judge must not be satisfied without really good evidence of due service of the notice. And where it is alleged that there has been no proper service, he ought to dispose of the question fully and explicitly, so that the position of the parties may not be left doubtful (c). The service must be

(a) *Musst. Koonjoy Suthhama v. Baboo Sheopursun Singh*, S.D.A., 1854, p. 281. See also *Petition No. 673 of 1854*, S.D.A., 1855, p. 8; *Puhlwan Singh v. Eshuree Singh*, S.D.A. N.W.P., 1853, p. 400; *Ramghureeb Chowbe v. Luchmee Pandey*, S.D.A. N.W.P., 1860, p. 34; *Mohun v. Jowahir Khan*, S.D.A. N.W.P., 1860, p. 38.

(b) *Syud Eusuf Ali Khan v. Mussamut Azumtoonissa*, W.R., 1864, p. 49.

(c) *Sutthhama v. Baboo Sheopursun Singh*, S.D.A., 1852, p. 557.

proved by evidence, the mere return of the nazir on the back of the Judge's perwannah to the effect that the mortgagor has been duly served is not legal evidence of the service (d).

In one instance, in which the notice was returned with a report that as the parties named in it could not be found, a proclamation had been affixed at the Judge's cutcherry and the residence of the parties,—this was reckoned to be insufficient; and it was said that the strict letter of the Regulation must be followed, and that the Regulation did not provide for the substitution of a proclamation, in such a case (e). Apparently, however, it was not proved that any effort had been made to serve the mortgagor personally: at any rate, this case is overruled by the later decisions cited above.

Nine out of eleven sharers made a mortgage of the whole joint property. The remaining two afterwards gave their consent in writing to the mortgage. Notice of foreclosure was served on the *nine* only. But it was held that this was, under the circumstances, sufficient notice to *all* the eleven (f).

The mere fact of cognizance on the part of the mortgagor, or his representative, that the property is liable to foreclosure, or cognizance of the steps which the mortgagee has been taking, will not absolve the mortgagee from the necessity of strict compliance with the requisitions of the law as to issuing and serving the notice of the application to foreclose (g).

(d) *Norender Narain Singh v. Dwarka Lal Mundur*, I.L.R. 3 Calc. 397 (P.C.).

(e) *Cheydee Lall v. Mussumat Choonnya*, S.D.A. N.W.P., 1851, p. 278. See also *Nuwab Syed Futeh Alee Khan Bahadoor v. Musst. Amatoon Hossein Begum*, S.D.A., 1858, p. 1775.

(f) *Ashootoss Deb v. Goolzar Bebee*, S.D.A., 1854, p. 511.

(g) *Sheikh Amudee v. Chahut-oonnissa*, S.D.A. N.W.P., 1851, p. 210; *Cheydee Lall v. Mussumat Choonnya*, S.D.A. N.W.P., 1851, p. 278.

The objection that notice has not been duly issued is by no means a *technical* objection (*h*).

The notice to redeem gives no efficacy to transactions not in themselves legal: and the non-appearance of the mortgagor within the prescribed year does not bar him from disputing the contract, or from proving it to be void or voidable (*i*). The mortgagee must establish his case like any other plaintiff.

Notice under sec. 8 of Ben. Reg. XVII of 1806, being issuable on application, without any sort of inquiry into the merits of the case, and without any intimation being given to the supposed mortgagor of the intention to make such application, no publicity can be considered to attach to its issue. The fact that a man has caused notice of foreclosure to be issued, is not in any way to be taken even *prima facie* as affording a presumption of his good faith (*j*). And the mortgagee's having served an occupant of the mortgaged lands with notice, is no admission of that occupant's right to redeem (*k*).

Notice of foreclosure having been issued, the mortgagor, or his representative, must take care, within the year of grace, to tender to the mortgagee, or to deposit in Court (which is always the safer plan), the whole amount of principal and interest, or if the mortgagee has had the usufruct

(*h*) *Nurab Syed Futeh Alee Khan Bahodoor v. Musst. Amatoon Hossein Begum*, S.D.A., 1858, p. 1775. See also *Santee Ram Jana v. Modoo Mytee*, 20 W.R. 363; *Dinonath Gangooly v. Nursingh Pershad Doss*, 22 W.R. 90; *Norender Narain Singh v. Dwarka Lal Mundur*, I.L.R. 3 Calc. 397 (P.C.)

(*i*) *Bisambar Ade v. Kalim Udden*, 5 Sel. Rep. 81; *Petition No. 769 of 1850*, S.D.A., 1851, p. 211; *Syed Vellaet Ali Khan v. Ramadheen Singh*, S.D.A., 1851, p. 648.

(*j*) *Petition No. 630 of 1847*, S.D.A., 1848, p. 36.

(*k*) *Prannath Roy Chowdry v. Rookea Begum*, 7 Moore's I.A. 323; S.C. 4 W.R. (P.C.) 37.



of the land, the amount of the principal only which is due. If no rate of interest has been agreed upon, it must be deposited at the rate of twelve per cent.; and no local custom can make a deposit at a lower rate of any use (l).

The principal debt and the interest due are all that need be deposited within the year of grace. It is not essential that costs incurred by the mortgagee in the matter of the mortgage should also be deposited (m).

A deed of conditional sale, after reciting that the vendor had received the sale consideration, Rs. 199, and had put the vendee in such possession of the property as the vendor himself had, continued with a clause to the effect that the vendor should not claim mesne profits nor the vendee interest; in case the vendee did not obtain possession he was to recover mesne profits for the period he was so out of possession; after the expiry of the term fixed the entire sale consideration money in a lump sum was to be repaid and the property redeemed, but in case of default in payment of the sale consideration the sale was to become absolute. The vendor did not get possession of the property for some years, and on the expiry of the term took proceedings under the Regulation to foreclose. The legal representative of the vendor thereupon deposited the Rs. 199, the consideration as mentioned in the deed, within the year of grace. The vendee then brought a suit for possession, and to have the sale declared absolute, and the question arose whether or not the legal representative should have deposited by way of interest the amount of mesne profits for the time the vendor was out of possession, in addition to the sale consideration, in order to prevent the sale becoming absolute. The question eventually came before the Full Court, and it was held by the majority

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(l) Ben. Reg. I of 1798, sec. 2. *Baboo Doorga Dutt v. Baboo Gunmesh Dutt*, S.D.A., 1859, p. 284.

(m) *Zalem Roy v. Deb Shahee*, Marsh. 167.

of the Judges (n), that on the construction of the deed, the deposit of the sale consideration, Rs. 199, was sufficient for the redemption of the property (o).

It has been already shown that the tender must be made in money, but that if the mode of repayment agreed on in the original contract is more favorable to the mortgagor than that provided by the Regulations, a tender made according to the contract is sufficient (p). Thus nothing being said in the mortgage deed as to interest, a deposit of the bare principal was held sufficient (q). But whatever stipulations to the contrary have been made, a tender or deposit in strict compliance with the terms of the Regulations is all that is necessary. Therefore where the mortgagee had been in possession, a deposit of the principal was held sufficient to prevent foreclosure, although the mortgage deed contained a covenant that the mortgage should be foreclosed, unless certain sums due for improvements, as well as the principal sum lent, were paid off within the year of grace (r).

Where it had been agreed between the parties, that a sum due from the mortgagee should be set off against so much of the mortgage debt, a deposit by the mortgagor of what remained due from him, after making the deduction, was held to be sufficient. But a mortgagor who makes a tender of this sort runs a very great risk, and ought to be very sure of his ground before he does so. For it has been held that if the sum tendered or deposited falls short, though it be only to the extent of one rupee, of the amount due, the mortgagor's right is, on the expiry of the year of grace,

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(n) *Spankie, J.*, dissenting.

(o) *Rameshar Singh v. Kanahia Sahu*, I.L.R. 3 All. 653.

(p) *Supra* pp. 373—374. Ben. Reg. XXXIV of 1803, sec. 14.

(q) *Radhanath Sein v. Bunjo Chunder Sein*, W.R., 1864, p. 157.

(r) *Budreenarain v. Oodho Singh*, S.D.A. N.W.P., 1853, p. 161.

wholly gone (s). The general principle of the Regulations is that if anything be due on the mortgage, and the mortgagor makes an insufficient deposit,—and *à fortiori* if he makes no deposit at all,—the right of redemption is gone at the end of the year of grace (t).

The tender or deposit must be made within a year from the date of the service of the notice of foreclosure. But if the last day of the year of grace happens to be a Sunday or other holiday, a deposit on the first ensuing business day will be sufficient (u). In one case, the last day for payment was the 25th of November. On that and several subsequent days, the Court was improperly closed by the Judge on account of the Sonepore Fair. It was held (v) that the mortgagor saved his estate from foreclosure by depositing the money in Court on the first day on which the Court was open after the 25th of November. It was held also that the mortgagor was under no obligation to make a private tender, on the 25th of November, of the amount due. This was a case in which the mortgagee had given an extension of time. But the same rule would

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(s) *Lyons v. Skinner*, S.D.A. N.W.P., 1853, p. 447. See also *Sheikh Ubdool Hadee v. Sookroo Singh*, S.D.A. N.W.P., 1855, p. 580 *Debee Doss Dutt v. Mohunlal Sookul*, S.D.A., 1859, p. 127; *Mohunlal Sookul v. Debedass Dutt*, S.D.A., 1859, p. 842; *Nubungo Moonjuree Dabee v. Goluckmonee Dabee*, Marsh. 45.

(t) *Forbes v. Ameeroonissa Begum*, 10 Moore's I.A. 340; S.C. 5 W.R. (P.C.) 47.

(u) *Sheikh Ubdool Hadee v. Sookroo Singh*, S.D.A. N.W.P., 1855, p. 580; *Baboo Indurjeet Singh v. Baboo Bhan Pertap Singh*, S.D.A. N.W.P., 1852, p. 60; *Abdool Hamed v. Saha-oon-nissa Beebee*, S.D.A. 1858, p. 627; S.C. on review, S.D.A., 1858, p. 1477; *Fuzl-oonnissa*, Petitioner, Rep Sum. Cases, 15th July 1841; *Kunhya Lal Thakoor v. Ras Munees Dossee*, 7 Sel. Rep. 264. But see contra, *Kumola Kunt Mytee v. Sreemutty Narainee Dossee*, 9 W.R. 583.

(v) *Dabee Rawoot v. Heeramun Muhatoon*, 8 W.R. 223. See also *Narayan Mandal v. Beni Madhab Sirkar*, 4 B.L.R. (F.B.) 32.

apply when the Court was improperly closed on the last day of the year of grace.

The Judge has no discretion to extend the time given to the mortgagor by the Regulation; and an order of the Judge giving the mortgagor four months additional time was set aside by the High Court (*w*). But when the mortgagee has himself granted an extension of time, a deposit or payment made before the expiry of the time so extended is sufficient (*x*). And such giving of time does not injure the foreclosure or make it necessary for the mortgagee to issue fresh notice (*y*).

After a mortgage had been foreclosed and the year of grace had expired, the mortgagee having all along been in possession of the property under the terms of the deed, the representative of the mortgagor deposited the mortgage money in Court. The District Judge thereupon ordered that the money should be paid out to the mortgagee, and that he should surrender the property on the ground that the mortgagor had not been personally served with the notice required by sec. 8 of the Regulation, and had no knowledge of the foreclosure proceedings. On revision, however, the Allahabad Court held that the District Judge had acted *ultra vires*. Had the mortgagee not been in possession on the termination of the foreclosure proceedings, he would have had to bring a suit to obtain possession, whilst as it was, if he wished to establish his title, he should have brought a suit for a declaration of his right. In either of those cases the mortgagor might have set up a defence that the foreclosure proceedings were irregular on the ground of

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(*w*) *Mahomed Gaze Chowdry v. Abool Mahomed Ameeroodeen*, 5 W.R. (Misc.) 31.

(*x*) *Zalem Roy v. Deb Shahee*, Marsh. 167; *Dabee Rawoot v. Heeramun Muhatoon*, 8 W.R. 223.

(*y*) *Brijo Mohun Sutputty v. Radha Mohun Dey*, 20 W.R. 176.

want of notice, or he might have made this matter ground for a suit by himself to set aside the mortgage proceedings. But as the year of grace had expired, and the foreclosure order had been made, the District Judge had no power to receive the money or to make the order he had made (z).

When a sum of money is brought for the purpose of being deposited in Court, it ought to be received, whatever its amount: and its receipt should be notified to the mortgagee. It is the duty of the Judge, when money is deposited, himself to grant a receipt for it to the mortgagor, and to issue notice to the mortgagee that the money has been deposited (a). And it has been said that it is irregular for the Court to make a report as to the insufficiency of the tender, and the amount required (b).

The tender or deposit must be made unconditionally, and if it is fettered with any restrictions, it is bad,—as was held in a case where the deposit was accompanied by a denial of the mortgagee's title, and notice that a suit would be brought to recover the money tendered (c).

The mortgagors some weeks before the expiry of the year of grace, applied for leave to deposit the money in Court, subject to a condition that it should not be paid to the mortgagee, but should be kept in Court until a regular suit disputing his claim could be brought. The Judge gave the permission asked for, and received the

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(z) *Hazari Lal v. Kheru Rai*, I.L.R. 3 All. 576.

(a) *Dabee Rawoot v. Heeramun Mukatoon*, 8 W.R. 223.

(b) *Sheikh Ubdool Hadee v. Sookroo Singh*, S.D.A. N.W.P., 1855, p. 580.

(c) *Prannath Roy Chowdry v. Rookea Begum*, 7 Moore's I.A. 323; S.C. 4 W.R. (P.C) 37; *Abdoor Ruhman v. Kisto Lal Ghose*, 6 W.R. 225 (a decision of a Full Bench overruling *Hethan Singh v. Nurkoo Singh*, 3 W.R. 184.) See also *Nubungo Moonjuree Dabea v. Goluckmonee Dabea*, Marsh. 45; S.C. reported as *Goluckmonee Dabea v. Nubungo Moonjuree Dabea*, W.R. Sp. 14.

money so conditionally deposited. The day after the year of grace came to an end, the Judge called upon the mortgagors to take away their money, remarking that such a conditional deposit was not allowable; and he afterwards declared the conditional sale to have become absolute, because the money had not been paid or deposited within the year. On appeal, the majority of the Court held that there was no sufficient deposit, and that the acts of the Judge formed no bar to the foreclosure of the mortgage (d).

So, when the mortgagor restrained the payment to the mortgagee of money deposited, pending the result of a redemption suit which he was about to bring, and the year of grace expired without any unconditional deposit being made, and the redemption suit failed, the mortgage was declared foreclosed as if there had been no deposit (e).

A mortgagee demanded a larger sum than was really due to him. The mortgagor paid into Court the sum he asked for, stating that he did so merely to obviate all objections, and not as admitting it to be due. The mortgagee having taken it all out of Court, the mortgagor sued for and recovered what he had taken in excess of that to which he was entitled (f).

The petition on which the mortgagor paid in the deposit stated that there was then pending another suit in which the mortgagor had sued the mortgagee for possession on the ground that the latter had realised both principal and interest from the usufruct and was entitled to no further payment from the mortgagor. No condition was annexed to the deposit: the mortgagor, admitting the mortgage, paid in the money to prevent foreclosure. It was held

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(d) *Muthoor Mohun Mitr v. Bindrabun Chunder Udhikaree*, S.D.A., 1847, p. 462.

(e) *Hurkishore Race v. Ojeer Ali*, S.D.A., 1848, p. 897.

(f) *Baboo Juggutputtee Singh v. Madho Singh*, S.D.A., 1855, p. 54.



that this was a good deposit, as the mortgagee might have taken the money out of Court if he had chosen (g).

The tender or deposit ought to be made in one sum, not by instalments. At least, it is to the mortgagor's advantage to pay in one sum, as his position is in no way benefited by the payment of any thing less than the whole amount due: and if he chooses to make several deposits on different dates, he will not be allowed interest on any of them, except from the date on which the demand was discharged in full, and due notice given to the mortgagee. The mortgagee is not obliged to receive sums deposited on account, until the whole is paid in; he defeats his own claim by accepting them, as his taking out of Court a sum paid in by the mortgagor is an acknowledgment that such sum is in full discharge of all monies due in respect of the mortgage debt (h).

If the mortgagor admits the claim of the mortgagee, and has not the means of paying what is due to him, he may put him in possession of the property, and without waiting till the end of the prescribed year, present a petition to the Court from which the notice issued, stating his inability to pay, and that he has made over possession to the mortgagee. And such a proceeding, if possession is actually given to the mortgagee, has apparently the same effect as a decree for possession on foreclosure, made in a regular suit. Probably, however, one who had purchased *bond fide* from the mortgagor before the presentation of the petition, might, notwithstanding, redeem at any time during the year of grace. And if possession is not delivered over to the mortgagee, the mortgagor's having filed such a petition, will not bar the right of any one who under

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(g) *Baboo Gobind Pershad v. Dwarka Nath*, 25 W.R. 259.

(h) *Baboo Inderjeet Singh v. Baboo Bhan Pertap Singh*, S.D.A. N.W.P., 1852, p. 60.



ordinary circumstances would have been entitled to redeem, except that the mortgagor himself would probably be held to be bound by his own act, and to be foreclosed (i).

In like manner, the mortgagor, without any proceedings whatever being taken in Court, may convey absolutely to the mortgagee, the property already conveyed to him conditionally. But in such a case, the mortgagee must be prepared to prove that the conveyance *out and out* has been fairly and properly obtained: and he ought at once to assert his rights as proprietor, and should no longer allow his name to appear as mere mortgagee (j).

It has been held that it is not absolutely necessary that there should be any written agreement, in order to convert a conditional into an absolute sale, even though the conditional sale itself was in writing: and that any thing which proves that the mortgagor has agreed to the sale being made absolute is sufficient. A suit was brought for possession of land which had at first been conditionally sold to the plaintiff, but which, it was alleged, had been afterwards absolutely conveyed to him. The plaintiff did not prove any positive contract making the sale absolute: but he produced from his own custody, the ikrars given by him to the defendant, declaring the sale to be only conditional, and he gave evidence to the effect that these had been delivered up to him by the defendant, on the payment to him of a further sum of money. It was held that there was conclusive evidence of an unconditional sale, and that the plaintiff must have his decree (k).

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(i) *Sheikh Hussoo v. Uttur Bibi*, S.D.A., 1849, p. 311.

(j) *Usman Rae v. Jyemungul Singh*, S.D.A. N.W.P., 1853, p. 273. See also *Doorgachurn Biswas v. Burda Soondree Debea*, S.D.A., 1856, p. 948; *Tewaree Loll v. Kasseenauth*, W.R. Sp. 79.

(k) *Sheik Dhunnoo Shalgur v. Sheikh Boorhan*, 7 Sel. Rep. 181; *Goordyal v. Mussumat Hunscoonwer*, 2 N.W.P. (Agra) H.C. 176. But see *Tewaree Loll v. Kasseenauth*, W.R. Sp. 79.

But a mortgagee ought for his own security either to insist upon having a regular decree of Court declaring the mortgage foreclosed, which undoubtedly gives him by far the safest title, or, if he chooses to have the sale made absolute without going into Court, he should see that the conveyance to him is made by a deed duly executed and registered.

If the mortgagor, or his representative, makes a tender or deposit within the year of grace, it remains for the mortgagee to consider whether or not he will accept the sum so tendered or deposited. He will accept it only if it covers the whole of his demand, as he cannot take it out in part payment and continue his suit for foreclosure, or for payment of what remains due.

If the mortgagee takes the money out of Court, he cannot draw back afterwards on the ground that the money was deposited after expiry of the year of grace,—or on any other ground (l).

If the mortgagee is ready to receive the sum deposited, the Judge in whose Court it has been placed will immediately pay it over to him; if he refuses to receive it, the Judge will restore it to the person who deposited it. The mortgagor who has tendered or deposited a sufficient sum, or a sum which is accepted as sufficient by the mortgagee, being in exactly the same position as one who has come forward to redeem and made a deposit or tender for that purpose under Ben. Reg. I of 1798, sec. 2, is entitled to possession summarily without suit (m). And the mortgagee, on applying to take the money out of Court, must surrender the mortgage deed, or show satisfactory cause for his not doing so (n).

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(l) *Khondkar Nowazush Hossein v. Mussamut Woosuloonissa Bibee*, 6 W.R. 249.

(m) Cir. Ord. 22nd July 1813.

(n) *Dewan Ramnath Singh v. Thakur Das*, 7 Sel. Rep. 260. And see *Supra* p. 393.

Up to this point, the functions of the Judge, in proceedings taken for foreclosure, are purely ministerial, he having merely, without instituting any inquiries into the merits of the case, or expressing any opinion as to them, to issue on the application of the parties certain fixed notices and orders,—to receive, and pay over to the mortgagee if desirous of taking it, whatever amount may be paid into Court by the mortgagor, or if the mortgagee should refuse to accept the same, to restore it to the mortgagor—and to receive proof of service of the several notices. And it is the duty of the Judge to confine himself to recording simply the facts which have occurred during the summary process, and to abstain from expressing any judicial opinion whatever on the proceedings. All questions as to their effect or as to the legality or validity of the alleged mortgage, or even as to the existence of a mortgage at all, must be left undecided at this stage, and form the subject of a regular suit to be subsequently instituted (o). But so far as the mere issue and service of the notice are concerned, he is to inquire and record judicially that all has been done properly (p).

After the lapse of the year of grace, in the event of the proper sum, or such a sum as is accepted by the mortgagee, not being deposited or tendered, the mortgagee who wishes to complete the foreclosure must institute a regular suit to have the conditional sale declared absolute, or, if he has not had the usufruct, for possession of the mortgaged land, as on a conditional sale become absolute (q).

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(o) *Forbes v. Ameeroonissa Begum*, 10 Moore's I.A. 340; S.C. 5 W.R. (P.C.) 47. See also *Norender Narain Singh v. Dwarka Lal Mundur*, I.L.R. 3 Calc. 397 (P.C.)

(p) *Meer Abbas Aly v. Nund Coomar Ghose*, 7 W.R. 123.

(q) *Forbes v. Ameeroonissa Begum*, 10 Moore's I.A. 340; S.C. 5 W.R. (P.C.) 47. See also *Jankee Pershad v. Hurnarain*, S.D.A. N.W.P., 1854, p. 234.

To succeed in his suit, the mortgagee must prove that all the legal formalities have been observed, that notice was issued from the proper Court, that it was duly served on the right parties, together with a copy of his application, that the period of a year from the service of it has elapsed, and that no sufficient tender or deposit was made before the expiration of the year of grace. Without proving all these points he cannot obtain a decree, whether the defendant pleads that there has been any irregularity or not,—not even if the case is tried *ex parte*. If service of the notice is denied, it must be proved independently of the mere copy of the foreclosure proceeding. Witnesses must be called to prove the service (*r*). The Court is not justified in overlooking any error in the summary proceedings, although its attention is not called to it by the parties most interested (*s*). So also the mortgagee must establish that, on the merits of the case, he is entitled to what he claims: for, as has been seen above, the mere issue of notice, and the proceedings in connection therewith, give no sort of validity to his claim, and if he cannot show a good title as mortgagee, his suit must be dismissed (*t*).

The mortgagor's not coming forward in Court, or taking any steps to protect himself during the year of grace, does not in any degree debar him from appearing in the

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(*r*) *Sookhmun v. Chooramun*, 1 N.W.P. (Agra) H.C. 172. See also *Ohoy Chunder Dutt v. Erskine & Co.*, 3 W.R. (Misc.) 11; and *ante* pp. 516, 517.

(*s*) *Parasnath Chowdhuri v. Lala Bihari Lal*, 5 Sel. Rep. 346; *Bijnath Pal v. Rajah Muhtab Chunder*, S.D.A., 1847, p. 485; *Roostum Khan v. Jowahir Singh*, S.D.A., 1853, p. 221.

(*t*) See *ante*, p. 518. *Bisambar Ade v. Kalim Udden*, 5 Sel. Rep. 81; *Syed Vellaet Ali Khan v. Ramadheen Singh*, S.D.A. 1851, p. 648; *Buldeen v. Musst. Golab Koonwer*, N.W.P. (Agra) H.C. (F.B.) 102.

mortgagee's suit for possession, and raising any plea on the facts and merits of the case: and the Judge is bound to investigate and decide the case on its merits, notwithstanding that no objections to the conditional sale were preferred till more than a year after service of notice of foreclosure (u). But any defence which the mortgagor sets up must have existed prior to the expiry of the year of grace,—the one great question in all foreclosure suits being, whether the mortgagee was on that date entitled to foreclosure or not. With that year ends the mortgagor's whole interest in his property, unless he can prove that previous to its lapse he was entitled to have it declared by the Court that the mortgage had been satisfied.

If the mortgagor takes no steps to redeem within the year, from the knowledge that the debt has been fully paid, and that therefore the mortgage cannot be foreclosed, he must nevertheless appear and defend a suit brought by the mortgagee to have the sale declared absolute and to obtain possession. If he does not do so, and a decree is made against him, it will be binding on him.

When the contract was made before the passing of Act XXVIII of 1855, the lender on a mortgage by conditional sale, who has been in possession and in the enjoyment of the usufruct of the land, must account to the borrower for the proceeds of the estate whilst in his possession. But an account is not necessarily to be taken in *every* such case: for example, it need not be taken if it is admitted on the face of the mortgagor's answer that something is still due from him. The obligation to account depends on the

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(u) *Petition No. 701 of 1847*, S.D.A., 1848, p. 6; *Petition No. 769 of 1850*, S.D.A., 1851, p. 211; *Syed Vellaet Ali Khan v. Ramadheen Singh*, S.D.A., 1851, p. 648; *Forbes v. Ameeroonissa Begum*, 10 Moore's I.A. 340; S.C. 5 W.R. (P.C.) 47. And see *Gujadhur Mowar v. Zinda Mowar*, 6 W.R. 69.

circumstances of the case and the nature of the issue raised (v).

And the rule that the mortgagee must account, does not apply to the mortgagee's possession after the lapse of the year of grace, if the notice issued is followed, within twelve years from the time when the mortgagee could first have sued, by a suit for foreclosure. In such cases, in a suit by a mortgagee to render absolute a conditional sale, the mortgagor may plead that prior to the expiry of the year of grace, the amount borrowed, together with the legal or stipulated interest, had been realised by the mortgagee from the usufruct of the property; and on this plea he is entitled to have an account from the mortgagee. But this defence will be of no avail unless on the taking of the accounts it appears that the whole sum due (including both principal and interest) had been realised before the close of the year of grace (w).

The Court is not to decree in favor of the mortgagors *simply* because the mortgagee does not produce his accounts. The Court must examine the mortgagor's accounts and see whether they support his case, before deciding in his favor (x).

(v) *Forbes v. Ameeroonissa Begum*, 10 Moore's I.A. 340; S.C. 5 W.R. (P.C.) 47.

(w) *Ibid.* See also Ben. Reg. I. of 1798, sec. 3. *Shah Abbas Reza v. Forbes*, S.D.A., 1857, p. 96; *Petition No. 483 of 1856*, S.D.A., 1857, p. 234; *Radhachurn Chatterjea v. Rajchunder Mullick*, S.D.A., 1858, p. 727; *Shah Coondon Lal v. Balgobind Singh*, S.D.A., 1858, p. 756; *Musst. Zenut Begum v. Musst. Waheedun*, S.D.A., 1858, p. 1235; *Petition No. 823 of 1858*, S.D.A., 1858, p. 1525; *Meglal Singh v. Hurnath Singh*, S.D.A., 1858, p. 1691; *Debee Doss Dutt v. Mohunlal Sookul*, S.D.A., 1859, p. 127. And see *ante*, pp. 403, 404.

(x) *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 12 Moore's I.A. 157 (*cf.* p. 198); S.C. 2 B.L.R. (P.C.) 44 (*cf.* p. 57); *Shah Coondon Lal v. Balgobind Singh*, S.D.A., 1858, p. 756; *Mussumat Fatmoonissa Begum v. Gyanee Ram*, S.D.A., 1859, p. 490; *Syud Hashum Ali v. Baboo Ramdharee Singh*, 7 W.R. 82. And see post Chap. X.

A mortgagee in possession foreclosed, and continued to remain in possession. The mortgagor ousted him, and the mortgagee sued to recover possession. The mortgagor defended the suit, and pleaded that before the foreclosure the mortgagee had received from the usufruct more than the whole sum to which he was entitled. It was ruled that the mortgagee must account in the usual manner (y). So, the mortgagee was forced to account, when he had had possession not avowedly but through a *benamee* farm to his nephew (z).

If the mortgagee, not being entitled to possession, wrongfully enters, he is just as liable to an account as if he had been in under his mortgage (a).

A mortgagee, who enters into a compromise with his debtor, and acknowledges in Court that he is satisfied, and renounces his right to foreclosure, cannot afterwards change his mind, and sue for foreclosure. During the progress of a foreclosure suit, the mortgagee made a compromise with the mortgagor, and filed a *solenamah*, renouncing all further claim to possession. He afterwards brought a fresh suit for possession on foreclosure, on the ground of non-performance of the terms of the compromise: but it was dismissed by the Court, which held that his rights as mortgagee were no longer in existence. In such a case, the remedy would probably be by a suit based on the compromise (b).

And so, a decree for foreclosure cannot be set aside on the ground that the mortgagor allowed the decree to go against him without offering any opposition, in consequence

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(y) *Petition No. 823 of 1858*, S.D.A., 1858, p. 1525.

(z) *Petition No. 483 of 1856*, S.D.A., 1857, p. 234. And see *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 12 Moore's I.A. 157; S.C. 2 B.L.R. (P.C.) 44.

(a) *Nilkant Sein v. Shikh Jaenooddeen*, 7 W.R. 30.

(b) *Ghunseam Dass v. Aitma Ram*, S.D.A. N.W.P., 1851, p. 260.



of the mortgagee's having executed a deed, during the year of grace, in which he covenanted to restore the mortgagor to possession on certain conditions, which covenant he had broken (c).

In one case, the year of grace expired in November 1872, but the mortgagee gave the mortgagor an extension of time up to March 1873, within which to pay off the mortgage debt. After making that arrangement, the mortgagor sold his rights in the estate: and it was held that the purchaser was entitled to redeem, if he did so before March (d).

There being five joint mortgagors, the mortgagee came to an arrangement with three of them by which he consented to take a decree against those three for Rs. 14,000. In taking an account subsequently of what the five were jointly liable for on the mortgage, the decree taken under that arrangement was treated as representing Rs. 14,000 paid at that time. The mortgagee chose instead of taking the money to take a decree for the money,—and in the account with the other mortgagors it was held that the decree must be considered as a sum paid in reduction of the liability of the five (e).

A decree of Court declaring a mortgage finally foreclosed and the mortgagee entitled to possession, puts an end forever to all the rights in the land, of the mortgagor and of any other person claiming under him who is bound by the decree and whose title did not originate prior to the date of the mortgage which has been foreclosed. Government

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(c) *Buddeoolzumah v. Baneepershad*, S.D.A. N.W.P., 1850, p. 294. See also *Nainsookh Misr v. Sheodyal*, S.D.A. N.W.P., 1854, p. 564; *Choube Hurbuns Rai v. Koonjbeharee Lol*, S.D.A. N.W.P., 1856, p. 119.

(d) *Baboo Ram Roop Singh v. Lalla Thakoor Pershad*, 24 W.R. 429.

(e) *Ram Kanth Roy Chowdhry v. Kalee Mohun Mookerjee*, 22 W.R. 310.

may, however, at any time cause lands to be sold for arrears of revenue, into whose hands soever they have passed.

A foreclosure decree of the old Supreme Court in a mortgage suit (as to lands in the mofussil) is equivalent in effect to a decree in the Mofussil Courts establishing proprietary right on a like instrument (*f*).

It is hardly necessary to observe that care must be taken by the Courts to ascertain the real nature of the mortgage they are dealing with, and that if the remedies applicable to one species of mortgage are made use of when the transaction belongs to another, the whole proceedings may be bad. Thus, when possession was given by the lower Court, under the impression that the mortgage agreement was one of conditional sale, and the transaction was afterwards, on appeal, found to have been only a simple mortgage, the transfer of the land made by the Court below was cancelled, and the mortgagees were enjoined to accept a tender of principal and interest which was made by the mortgagor, notwithstanding that more than a year had elapsed from the issue of notice of foreclosure by the mortgagee as in a case of mortgage by conditional sale (*g*). So, the Court of appeal, considering the mortgage to be by conditional sale, reversed the decision of the District Judge and Munsiff, who had respectively held that the transaction was a simple mortgage and therefore not subject to the rules applicable to conditional sales (*h*).

In a suit for possession on foreclosure, a decree for money cannot be given (*i*). And a suit will not lie by a mort-

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(*f*) *Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan*, 10 Moore's I.A. 322; S.C. 5 W.R. (P.C.) 83.

(*g*) *Ram Tuwulkul Raee v. Uchee Lal*, S.D.A., 1848, p. 194.

(*h*) *Ramrutton v. Gholam Jafur Khan*, S.D.A. N.W.P., 1853, p. 370.

(*i*) *Syed Vellaet Ali Khan v. Ramadheen Singh*, S.D.A., 1851, p. 648. See also *Jeorakhun Lall v. Nuwul Singh*, S.D.A. N.W.P., 1856, p. 75.

gagee to foreclose and to recover interest. "Had the mortgagor repaid the money lent, interest would have been payable under the section referred to (j); but by foreclosing the mortgage and obtaining possession of the property, the mortgagee must be considered to have secured all he was entitled to receive in the transaction" (k).

The mortgagee having obtained a decree for foreclosure and possession, is entitled to immediate possession of the property; and if he meets with any opposition or delay, he is entitled to recover all costs and expenses incurred by him in consequence, together with mesne profits or wasilat from the date of his decree. And for these costs and mesne profits, the mortgagor and all those who represent him, and are bound by the decree, are liable (l).

In one case, where the terms of the contract were that in the event of the mortgagor's making default in payment on a particular day, he would put the mortgagee in possession of certain lands by way of absolute sale, and the mortgagor made default in payment and also in surrendering his property as agreed,—the mortgagee was allowed to sue for the recovery of the principal sum lent, with interest, and was not restricted to his suit for possession (m). But ordinarily the mortgagee cannot sue for the recovery of the money lent by him, instead of for foreclosure and possession, except when good and sufficient cause is shown for his adopting such a course. And only something which, without any blame on his part, renders it impossible for the

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(j) Ben. Reg. I of 1798, sec. 2.

(k) *Musst. Doorga Koonwar v. Chede Lal*, S.D.A., 1856, p. 388.

(l) *Hursahae Singh v. Syud Mohummud Hosein*, S.D.A., 1847, p. 479.

(m) *Khedoo Lal Khatri v. Rattan Khatri*, 5 Sel. Rep. 10. See also *Srimati Sarasibala Debi v. Nund Lal Sen*, 5 B.L.R. 389.

mortgagee to obtain possession, will be considered to be good and sufficient cause (n).

Thus the mortgagor having been all along in possession, and having neglected to pay the Government revenue, in consequence of which the land was, after the issue of notice of foreclosure, sold for arrears, the mortgagee was allowed to recover the principal and interest due to him, his lien having been destroyed through no fault of his (o). And in a recent case, the facts were that two out of several co-sharers mortgaged, as their own, by way of conditional sale, a portion of the joint family property. The mortgagee foreclosed and then instituted a suit for possession, which he withdrew with liberty to bring a fresh suit. He afterwards brought a suit for possession against the mortgagors and their co-sharers, on the representation of the mortgagors that it would be undefended. It was, however, defended by the co-sharers, and the suit was dismissed. The mortgagee then sued for the return of the money which had been lent on the mortgage and for the costs in the suit which had been dismissed, and, though the mortgage-deed contained no stipulation for the repayment of the debt, the Court applying the rule laid down above, held that he was entitled to recover (p).

But, as the rights of a mortgagee are in no degree affected by any subsequent transfer of the mortgaged property except a sale for revenue, a private sale by the mortgagor, or even a sale in execution of a decree and after the issue of notice of foreclosure, will not entitle a mortgagee by conditional sale to sue to recover the debt. His remedy is

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(n) Cons. 898, 5th September 1834. *Mohanund Chuturjeea v. Govindnath Ray*, 7 Sel. Rep. 92.

(o) *Bulram Sein v. Hurree Churn Shah*, S.D.A., 1848, p. 368.

(p) *Bhugwan Acharjee v. Govind Sahoo*, I.L.R. 9 Calc. 234. As to the mortgagee's right to recover the costs, see *infra*, pp. 539, 540.

still against the land alone (q). And so, where the mortgagee had obtained a decree for foreclosure and possession, but before he could get possession, the property was advertised and sold in satisfaction of the decree of another judgment-creditor (r).

One who for good and sufficient reason sues for the money due, instead of for foreclosure and possession, must not sue merely as on a common money bond, but as for money which he has become entitled to claim in consequence of the mortgagor's breach of contract. His plaint, in short, must be consistent with the case he intends to prove (s).

It has been said that if a suit is brought for money when it ought to have been for possession, or *vice versa*, the objection must be specially pleaded by the party who wishes to take advantage of it, and that the Court must not of its own accord take notice of the error (t). But if a plaintiff sues for that to which, according to his own showing, he is not legally entitled, it is difficult to see how the Court can do otherwise than reject his plaint, or dismiss his suit, whether the defendant takes the objection or not.

In one instance, a mortgagee sued for and recovered one half of the sum advanced by him. The mortgagor, on receiving the loan, had executed a deed engaging to make over certain property in mortgage by conditional sale; but he in fact made over only half of that property. The

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(q) *Kishenpershad Bonnerjee v. Ramchurn Paree*, 7 Sel. Rep. 42; *Busraj v. Achybur Tewaree*, S.D.A. N.W.P., 1848, p. 209.

(r) *Oodyt Narain Singh v. Bhowannee Pershad*, S.D.A. N.W.P., 1852, p. 272.

(s) *Musst. Jhanoo Bibi v. Nubokishen Ghose*, S.D.A., 1850, p. 44.

(t) *Khoobchund v. Munohur Lal*, S.D.A. N.W.P., 1853, p. 272; *Bhowanee Dihul Rai v. Bisheshur Pershad Singh*, S.D.A. N.W.P., 1853, p. 591.

Court ordered that he should return to the mortgagee a proportional amount of the sum received by him, with interest (*u*).

When mortgaged lands are sold for arrears of Government revenue, which have not accrued through the default of the mortgagee, any proceeds which may arise from the sale, in excess of the arrears, are subject to the claim of the mortgagee (*v*).

And if the proceeds in excess of the arrears due in respect of the lands sold, are applied by the Collector in liquidation of arrears due from the mortgagor on *other* lands, the sum so applied may be recovered by the mortgagee (*w*).

The mortgagees of a two annas share of a certain property instituted the ordinary proceedings to foreclose: but the mortgagor continued in possession after the expiry of the year of grace. Being so in possession the mortgagor neglected to pay certain Government revenue, and some of her co-sharers paid it. Subsequently the mortgagee sued the mortgagor for possession (on foreclosure), got a decree and obtained possession under it. It was held that the co-sharers were entitled to recover from the mortgagee the amount which they had paid (on the mortgagor's default) for Government revenue. When the default occurred, the mortgagees had in fact completed their legal title to the two annas share, and were entitled to

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(*u*) *Derbmoe Daseea v. Debnarain Roy*, S.D.A., 1851, p. 750.

(*v*) *The Collector of Midnapore v. Raja Pirtheebullub Pall*, S.D.A., 1854, p. 182; *Muddunmohun Chatterjee v. Kalikadeen*, S.D.A., 1855, p. 411. And see *Petition No. 23 of 1857*, S.D.A., 1857, p. 527; *Shumbhoochunder Ghose v. Moheshchunder Mitter*, S.D.A., 1859, p. 622. And see *ante* pp. 271, 274.

(*w*) *The Collector of Midnapore v. Raja Pirtheebullub Pall*, S.D.A., 1854, p. 182.



possession: and they might, if they had pleased, have paid the revenue which the mortgagor failed to pay (x).

A mortgagee who forecloses and subsequently gets possession, is not liable for back rents which accrued due prior to his obtaining possession,—unless he has expressly agreed that he shall be so liable (y). And a mortgagee who has foreclosed may, if he pleases, sell his right title and interest in the mortgaged land, and the purchaser will be entitled to possession just as the mortgagee himself was entitled (z).

A plaintiff sued to have his name registered in the Collectorate as proprietor of certain lands, alleging that he was in possession, the property having first been leased to him and then (before the lease expired) mortgaged to him, and the mortgage having been foreclosed. The Judge nonsuited the case because the plaintiff “had not obtained possession of the foreclosure in virtue of his mortgage,” and because “he was bound to sue for possession under the mortgage before he could prefer a claim for mutation of names.” The Sudder Court decided that “as the plaintiff was in possession, and his suit for the mutation of names brought into issue, every point that could have required investigation in a suit for possession under the mortgage,” the Judge should have tried the case on the merits. And it was accordingly remanded to him for re-trial (a).

In a suit for foreclosure, a third party intervened and proved an absolute sale to himself prior to the date of the mortgage. The mortgagee's foreclosure suit was consequently dismissed, and he was ordered to pay the costs

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(x) *Gunga Gobind Mundul v. Ashootosh Dhur*, 21 W.R. 255.

(y) *Kallee Dass Bhattacharjee v. Butcher*, S.D.A., 1856, p. 1019.

(z) *Debnarain Bose v. Panchamun Roy*, S.D.A., 1860, vol. 2, p. 53.

(a) *Petition No. 998 of 1854*, S.D.A., 1856, p. 8.



of the intervening proprietor. On appeal, this order was confirmed, as it was the mortgagee's suit which compelled the third party to come into Court; the mortgagee, however, was entitled to recover from the mortgagor all the costs incurred by him in the case, including those of the intervener (b).

If a mortgagee alienates the mortgaged property while a suit instituted by him for foreclosure is pending, the alienation will not be allowed to stand between the mortgagor and those rights to redeem which that suit may have left open or affirmed to him (c).

One who has the right of pre-emption may assert it when the conditional sale comes to be made absolute. The right of pre-emption does not arise on the making or entering into the contract of conditional sale or mortgage, nor until the mortgagor's right of property has been completely extinguished. But as soon as the year of grace expires—no steps having been taken to redeem—a suit for pre-emption may be maintained (d). Or, in other words, the cause of action of a person claiming the right arises on the expiration of the year of grace without payment by the mortgagor of the mortgage money, inasmuch as on the expiration of that period the mortgagee acquires a proprietary title to the mortgaged property. Such person can therefore sue to enforce his right of pre-emption on the expiry of the year of grace, and need not wait to do so until the mortgagee has obtained proprietary possession of the mortgaged property (e).

(b) *Rasmonee Dasee v. Ilahee Buksh*, S.D.A., 1853, p. 574, followed in *Bhugwan Acharjee v. Gobind Sahoo*, I L.R. 9 Calc. 234.

(c) *Seedee Nazeer Ali Khan Bahadoor v. Rajah Ojoodhya Ram Khan*, 8 W.R. 399.

(d) *Goordyal Mundur v. Rajah Teknarain Singh*, 2 W.R. 215 (F.B.); *Mussamat Tara Kunwar v. Mangri Meea*, 6 B.L.R. (App.) 114.

(e) *Hazari Ram v. Shankar Dial*, I.L.R. 3 All. 770. See also *Jaikaran Rai v. Ganga Dhari Rai*, I.L.R. 3 All. 175.

On the 12th May 1871 *B* mortgaged by way of conditional sale a share of a village to *A*, a stranger. The mortgage having been foreclosed, *A* sued *B* for possession of the share, and obtained a decree on the 16th April 1878, in execution of which he obtained possession of the share on the 9th September 1878. On the 1st September 1879, *S*, a co-sharer, sued *A* and *B* to enforce his right of pre-emption in respect of the share in question, founding his suit on the following clause in the administration paper of the village: "When a shareholder desires to transfer his share, a near relative shall have the first right; next the shareholders of the other pattis; if all these refuse to take, the vendor shall have power to sell and mortgage, &c., to whomsoever he likes." It was held by a majority of a Full Bench (*f*) that having regard to the terms of the administration paper, a cause of action accrued to *S* when the mortgage was foreclosed, and further (*g*) that a cause of action also accrued to *S* when the share was mortgaged by way of conditional sale to *A* (*h*).

Art. 10 of Schd. II of Act XV of 1877 (the present Limitation Act) declares that a suit to enforce a right of pre-emption, whether the right is founded on law or general usage or on special contract, must be brought within one year of the time when the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold; or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered. It has been held by a Full Bench of the Allahabad Court that this article is inapplicable to suits to enforce a right of pre-emption in respect of a mortgage by conditional sale, the limitation

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(*f*) *Stuart, C.J., Spankie, Oldfield and Straight, J.J., (Pearson, J., dissenting).*

(*g*) *Stuart, C.J., dissented on this point.*

(*h*) *Alu Prasad v. Sukhan, I.L.R. 3 All. 610.*

for which is that contained in Art. 120 of the same schedule, namely, six years from the time when the right to sue accrues (i),—and this ruling was followed in a late case in which it was held that where the mortgagee by conditional sale is not in possession under the mortgage, and after foreclosure has to sue for possession, the right to sue to enforce a right of pre-emption accrues and therefore limitation commences to run when the mortgagee obtains a decree for possession (j).

Though this is the view of the Courts as to the application of Art. 10 of the present Act, the corresponding article of the old Act (k), which declared that a suit to enforce a right of pre-emption must be commenced within one year from the time when the purchaser takes actual possession under the sale sought to be impeached, was held to apply to mortgages by conditional sale (l). So it was ruled under that Act, that the purchaser of the equity of redemption of immoveable property which is at the time of sale in the usufructuary possession of the mortgagee, “takes actual possession” within the meaning of that term as used in Art. 10, when the equity of redemption is completely transferred to and vested in him (m).

(i) *Nath Prasad v. Ram Paltan Ram*, I.L.R. 4 All. 218 (F.B.) For the application of Art. 10 in the case of ordinary contracts of sale, when the interest sold is incapable of “physical possession;” see *Unkar Das v. Narain*, I.L.R. 4 All. 24 (F.B.); and *Bholi v. Imam Ali*, I.L.R. 4 All. 179.\*

(j) *Rasik Lal v. Gajraj Singh*, I.L.R. 4 All. 414. See also *Ashik Ali v. Mathura Kandu*, I.L.R. 5 All. 187; but compare *Prag Chaubey v. Bhajan Chaudhri*, I.L.R. 4 All. 291, where Art. 10 was applied to the suit.

(k) Act IX of 1871, Sch. II, Art. 10.

(l) *Bijai Ram v. Kallu*, I.L.R. 1 All. 592.

(m) *Jageshar Singh v. Javahir Singh*, I.L.R. 1 All. 311. (A Full Bench case in which *Stuart*, C.J., dissented).

The pre-emptor, in the case of a mortgage by conditional sale which has become absolute, is bound to pay, as the price of the property, the entire amount due on the mortgage at the time it became absolute (n).

But where the right of pre-emption was sought to be enforced not in respect of the foreclosure, whereby the mortgagees acquired ownership on the expiry of the year of grace, but in respect of a sale of the property to the defendants which the mortgagees had made, after they had acquired the ownership, it was held that it was by the terms of that sale, and not by the amount due on the mortgage at the expiry of the year of grace, that the price payable by the pre-emptors must be regulated (o).

In the same case it was laid down by the Court that a proceeding under Ben. Reg. XVII of 1806 foreclosing a mortgage by conditional sale was not conclusive as to the amount of the mortgage money against persons subsequently claiming to enforce a right of pre-emption and raising the question as to the amount of the purchase-money.

As there is no system of law prevalent in India, other than the Muhammadan law, which provides systematic substantive rules in regard to the right of pre-emption, the Courts will follow and adopt the analogies furnished by the rules of that law in dealing with cases of an equitable nature, in which the right of pre-emption is the subject of controversy. Where, therefore, a co-sharer in a village, who had under the *wajib-ul-urz* a right to the mortgage of a share in such village, in anticipation of obtaining the mortgage, mortgaged such share to a stranger (that is, a person who had not a preferential right to the mortgage) it was held by the Court, applying the doctrine

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(n) *Ashik Ali v. Mathura Kandu*, I.L.R. 5 All. 187.

(o) *Tawakkul Rai v. Lachman Rai*, I.L.R. 6 All. 344. As to the *onus probandi* in such cases, see the same case and *Bhagwan Singh v. Mahabir Singh*, I.L.R. 5 All. 184.

of the Muhammadan law, that she had thereby forfeited her pre-emptive right to the share (p).

In one case the defendant, the owner of a share in a village, sold his share absolutely to the plaintiff, and the latter, more than four months after the date of the sale, agreed to re-transfer the share to the defendant, if the defendant desired at any time within thirteen years to re-purchase it, on payment of the sum which the plaintiff had paid for it. In a suit brought by the plaintiff, before the thirteen years had expired, the defendant not having taken advantage of the agreement, to enforce the right of pre-emption in respect of the sale of another share of the village which the defendant had purchased, it was contended on behalf of the defendant that he was still a co-sharer in the village, his share not having been absolutely transferred to the plaintiff, but only mortgaged by conditional sale to him, and therefore that the sale of the other share to the defendant was not impeachable. But it was ruled by a Full Bench that the plaintiff, having become by the sale the out-and-out proprietor of the share of the defendant, until the defendant availed himself of the option given by the subsequent agreement, the full estate of an owner carrying with it the right of pre-emption vested in him, and it was competent for him to enforce such right by suit (q).

The above observations on the subject of the foreclosure of mortgages by conditional sale are, in so far as they are founded on cases which turn upon the provisions of the Bengal Regulations, inapplicable to mortgages by conditional sale in Madras and Bombay.

As noted above (r), such mortgages were originally treated in those provinces as contracts which, on breach of

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(p) *Rajjo v. Lalman*, I.L.R. 5 All. 180. See also *Zamir Husain v. Daulat Ram*, I.L.R. 5 All. 110.

(q) *Bhajan v. Mushtak Ahmad*, I.L.R. 5 All. 324 (F.B.)

(r) See *supra*, page 17.

the condition therein stated, executed themselves without any further act of the parties or accountability between them. But when the Courts adopted the practice of Courts of Equity in England, and allowed redemption by the mortgagor after the expiry of the time limited by the contract, the correlative right of the mortgagee to foreclose his mortgagor's equity of redemption had also to be recognised (s). Thus foreclosure suits (t) came into existence, and as the Legislature did not, as in Bengal, provide any special procedure for such suits (u), the Courts in Madras and Bombay have adopted a procedure of the nature of that followed by English Courts and similar to that which is now prescribed for all mortgages to which that Act is applicable by the Transfer of Property Act, 1882, secs. 86 and 87 (v).

(s) In Madras this right seems not to have been recognized at first, see *Vencatachellam Pillai v. Tirumala Chary*, 2 Mad. H.C. 289, and the remarks of Turner, C.J., in *Ramasami Sastrigal v. Samiyappanayakan*, I.L.R. 4 Mad. 179 (cf. p. 186).

(t) Such suits would seem to have been originally merely suits for possession, (see, e.g., *Venkata Reddi v. Parvati Ammal*, 1 Mad. H.C. 460; and *Lakshmibai v. Vithal Ramchandra*, 9 Bom. H.C. 53 (cf. p. 55); or to have the conditional sale declared absolute (see, e.g., *Vencatachellam Pillai v. Tirumala Chary*, 2 Mad. H.C. 289).

(u) In Madras, however, secs. 8 and 9 of Mad. Reg. XXXIV of 1802 prescribed a system of accounting in cases when the mortgagee had been in possession, see *Pattabhiramier v. Vencaturou Naicken*, 7 B.L.R. (P.C.) 136 (cf. p. 141) while in Bombay, sec. 15 of Bom. Reg. V of 1827 lays down certain general rules for the disposal of property mortgages which should not be overlooked.

(v) See Tagore Law Lectures, 1876, p. 172. In the earlier Madras cases, at any rate, the period for payment was apparently fixed at three months; [see *Venkatta Reddi v. Parvati Ammal*, 1 Mad. H.C. 460 (cf. p. 465), and *Vencatachellam Pillai v. Tirumala Chary*, 2 Mad. H.C. 289 (cf. p. 290).] It may also be noted that it is believed that the usual practice for the Mofussil Courts in Madras and Bombay is to take the accounts before making a decree.



the question of interest to be settled on an adjustment of the account: *secondly*, when he has deposited all that he admits or alleges to be due: and, *thirdly*, when he pleads and undertakes to prove that the whole of the principal and interest have been liquidated by the usufruct of the property" (e).

The mortgagor who alleges that the mortgage debt has been satisfied from the usufruct, must prove his case, like any other litigant. But he is entitled to demand that the mortgagee's account shall be filed before he, the mortgagor, is called upon actually to prove that the debt has been satisfied (f).

When the Court dismisses a redemption suit on the ground of the mortgage debt not having, up to the date of suit, been liquidated from the usufruct, it should determine the exact sum then outstanding, by making up a correct account and disposing of the objections of the parties in regard to the items composing it, in order that no matter admitting of adjudication in that action may be left open to future litigation (g).

The mortgagor, if allowed to remain in possession, is not bound to account for the rents and profits received by him from the land; and there seems to be no exception to this

(e) *Forbes v. Ameeroonissa Begum*, 10 Moore's I. A., 340; S.C. 5 W. R. (P. C.) 47 (cf. p. 52). See also *Ram Lochun Patuk v. Baboo Kunhya Lall*, 6 W. R. 84; and *ante* pp. 395 *et seq.*

(f) *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 12 Moore's I. A. 157 (cf. p. 192); S.C. 2 B. L. R., (P. C.) 44 (cf. p. 53). *Jadoobungse Sahoy v. Moheeput Singh*, S. D. A. 1855, p. 432; *Chowbey Hurbuns Rae v. Chowdree Petum Singh*, S.D.A. N.W.P. 1854, p. 371.

(g) *Mussumat Ranees Sengur v. Mussumat Ranees Rugzel*, S. D. A. N. W. P., 1853, p. 112; *Bhyroperashad v. Ram Dass*, S.D.A. N.W.P. 1854, p. 388. See also *Rajah Saheb Perladh Singh Bahadoor v. Broughton*, 24 W. R., 275. And see *ante*, pp. 382, 383, and 401—403.



rule, however insufficient the security may be. But if, in breach of an express agreement to the contrary, he remain in possession, to the exclusion of the mortgagee, the latter will have his remedy in a suit for possession and mesne profits.

The mortgagee is subject to an account from the time he is put in possession, and for the whole period that he remains in possession in the character of mortgagee (*h*). But he will not be so subject if the mortgage was made after Act XXVIII of 1855 came into force, and there is an express stipulation that he shall not be called on to account (*i*). If the mortgagee has, during a part of his term, held under some title other than that as mortgagee, he will not have to answer to the mortgagor for the proceeds accrued during that period. In one case, it happened that neither the mortgagee in possession, nor the mortgagor, chose to pay up certain old balances of revenue which had become due before the making of the mortgage. The Collector having entered on the estate, the mortgagee afterwards came forward and paid the arrears, whereupon the Collector gave him a farm of the land for ten years. These ten years were held to constitute a gap in the possession under the mortgage, and the mortgagee was not compelled

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(*h*) Ben. Reg.I of 1798, sec. 2; *Shah Abbas Reza v. Forbes*, S.D.A., 1857, p. 96; *Petition No. 483 of 1856*, S.D.A., 1857, p. 234; *Radhachurn Chatterjee v. Rajchunder Mullick*, S.D.A., 1858, p. 727; *Shah Goondon Lal v. Balgobind Singh*, S.D.A., 1858, p. 756; *Musst. Zenut Begum v. Musst. Waheedun*, S.D.A., 1858, p. 1235; *Petition No. 823 of 1858*, S.D.A., 1858, p. 1525; *Meglal Singh v. Hurnath Singh*, S.D.A., 1858, p. 1691; *Debee Doss Dutt v. Mohunlal Sookul*, S.D.A., 1859, p. 127; *Mussumat Fatimoonissa Begum v. Gyanee Rami*, S.D.A., 1859, p. 490. And compare the Transfer of Property Act, 1882, sec. 76, cl. (*g*).

(*i*) Compare the Transfer of Property Act, 1882, sec. 77.

to render an account of the profits then received by him (*j*).

Where the mortgage deed declared that the mortgage was to have effect from a date prior to that of the deed, it was held that the mortgagee who had been in possession was liable to account for the proceeds from such prior date, but that the mortgagor must be charged with interest from the same date (*k*).

In taking the accounts, interest is, as a general rule, allowed on the payments of both parties. There are two modes in either of which the accounts may be made up. They may be permitted to run on, from the date of the loan to the date of settlement, interest being allowed to the one party on the whole sum lent, and to the other on the sums realised over and above the interest to which the mortgagee is entitled, from the date of realisation:—or the amount collected by the mortgagee in possession may be carried first to interest, and after paying that, to the liquidation of the principal, the account being closed at the end of each year, and there being allowed from year to year only reduced interest on the reduced principal (*l*). The result attained by these methods is the same.

According to Hindu law a sum larger than the amount of the principal debt could not be recovered on account of arrears of interest at any one time. But if the principal remained outstanding, and the interest were paid in sums smaller than the amount of the principal, there was no

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(*j*) *Syed Kuramut Ali v. Syed Imdad Ali*, S.D.A. N.W.P., 1852, p. 7.

(*k*) *Sheo Munog Singh v. Syud Khadim Hoossein*, S.D.A. N.W.P., 1855, p. 684.

(*l*) See *Radhabenode Misser v. Kripa Moyee Debea*, 14 Moore's I.A., 443; S. C. 10 B.L.R., 386; *Durbaree Lal Sahoo v. Baboo Ram Narain Singh*, S.D.A., 1848, p. 549; *Musst. Hurdoorga Chowdraine v.*

limit to the amount of interest which might be thus received from time to time (*m*).

Then came the Regulations (*n*), the practical result of which was that no more than twelve per cent. could ever be recovered. And Ben. Reg. XV of 1793, sec. 6, enacted that if interest on any debt, calculated according to the rates allowed by that Regulation, accumulated so as to exceed the principal, the Courts were not to decree a greater sum for interest than the amount of such principal (*o*). This rule, it is to be observed, applied only to interest allowed to accumulate: and it did not apply to interest which accrued due after the institution of the suit, nor restrict the lender or

*Kaleenath Bhoomeek*, S.D.A., 1852, p. 831; *Musst. Hurmonee Debea v. Kishen Mungul*, S.D.A., 1859, p. 497; *Ranee Kureemoonissa v. Ramnarain Singh*, S.D.A., 1859, p. 1211; *Rajdhoolub Ghose v. Chamaroo Tagore*, S.D.A., 1859, p. 1543; *Mohunt Chotgorbhooj Doss v. Doorga Churn Pakaree*, 5 W.R., 200; *Raghnath v. Luckmun Singh*, 1 N.W.P. (Agra) H.C. 132. And compare the Transfer of Property Act, 1882, sec. 76, cl. (*h*.)

(*m*) *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 12 Moore's I.A. 157 (*cf.* p. 187); S.C. 2 B.L.R. (P.C.) 44 (*cf.* p. 49); *Dhondu Jagannath v. Narayan Ramchandra*, 1 Bom. H.C. (a.c.j.) 47; *Nathubhai Panachand v. Mulchand Hirachand*, 5 Bom. H.C. (a.c.j.) 196. See also *Narayan bin Babaji v. Gangaram bin Krishnaji*, 5 Bom. H.C. (a.c.j.) 157.

(*n*) Sec. 30 of 13 Geo. III. c. 63, passed in the year 1773 was before the Regs., but this enactment would seem to have been inapplicable to Native British subjects (see the remarks of *Stuart*, C.J., in *Mahtab Kuar v. The Collector of Shahjahanpur*, I.L.R. 5 All. 419 (*cf.* pp. 426 to 427.)

(*o*) This enactment was extended to Benares by Ben. Reg. XVII of 1806, sec. 2. To the same effect are Ben. Reg. XXXIV of 1803, sec. 5, and Mad. Reg. XXXIV of 1802, sec. 4. All these provisions are repealed by Act XXVIII of 1855. See *Kiddar Nath v. Hussun Ali*, S.D.A. N.W.P., 1853, p. 479, and *Raja Barda Kant Rai v. Bhagwan Das*, I.L.R. 1 All., 344.

mortgagee to the receipt *in the whole* only of interest equal to the amount of the principal lent (*p*). By Act XXVIII of 1855, section 6 of Ben. Reg. XV of 1793 was repealed, as also were "all laws relating to usury" in force in any part of the British territories,—and it was enacted, in substance, that in all contracts falling under Act XXVIII of 1855 interest at the rate stipulated should be allowed between the parties.

The effect of this Act upon the Hindu and Mahomedan law has been the subject of several decisions, which were recently discussed and considered by a Division Bench of the Calcutta High Court.

In this case (*q*), which came up on appeal from the Mofussil, it was held that the rule of law prohibiting the recovery of interest in excess of the principal sum lent was in force in the mofussil of Bengal, not as a provision of Hindu law, but as a statutory rule introduced by Ben. Reg. XV of 1793, and embraced all persons contracting in the Mofussil, and therefore that since the passing of Act XXVIII of 1855, a Hindu creditor may claim from his Hindu debtor interest in excess of the principal sum lent, should such interest have accrued. In delivering judgment, the Court made the following general observations as to the law relating to usury :

"By Regulation XV of 1793, section 6, it was declared that if the interest on any debt, calculating according to the rates allowed by the Regulation, should accumulate so as to

(*p*) *Mussumaut Mukhun v. Mohunt Rampershaud*, 1 Sel. Rep. 242; *Baboo Jankee Pershad v. Maharajah Oodwunt Narain Singh*, 3 Sel. Rep. 270; *Goverdhun Das v. Waris Ali*, 4 Sel. Rep. 261; *Rajdhoolub Ghose v. Chamaroo Tagore*, S.D.A., 1859, p. 1543; *Syed Enaet Ali v. Kuhur Roy*, 2 W.R., 289. See also *Y-Annaji Rau v. Ragubai*, 6 Mad. H.C., 400.

(*q*) *Surjya Narain Singh v. Sirdhary Lall*, I. L. R. 9 Calc. 825. See also *Het Narain Singh v. Ram Dein Singh*, I. L. R. 9 Calc., 871.

exceed the principal, the Courts were not, except in certain specified cases, to decree a greater sum for interest than the amount of such principal. This was not declared to be a principle of Hindu law, applicable only to Hindus, but was a statutory provision embracing all persons contracting in the Mofussil. Nevertheless, it was the practice of the Courts to allow interest in excess of the principal where the interest had accumulated owing to reasons not ascribable in any degree to the laches of the creditor. In the case of *Baboo Jankee Pershad v. Maharajah Oodwunt Narain Sing* (r), it was decided that interest exceeding the principal could, in the case of Hindus, be granted if the excess accrued *pendente lite*, and there is no fault attributable to the creditor. No custom or usage among Hindus was asserted in that case. Subsequently in the case of *Goverdhun Dass v. Waris Ali* (s), interest exceeding the principal was granted. This was the state of the law and practice of the Courts until the supersession of Regulation XV of 1793 by Act XXVIII of 1855. By section 2 of that Act it was declared that in any suit in which interest was recoverable the amount should be adjudged or decreed by the Court at the rate, if any, agreed upon by the parties, and if no rate should be agreed upon at such rate as the Court should deem reasonable. Subsequent to the passing of this Act, in the case of *Kalica Prosaud Misser v. Gobind Chunder Sein* (t), it was decided that the law under which the claim for accumulated interest was limited in amount to a sum not exceeding the principal had been rescinded by Act XXVIII of 1855. This was a case between Hindus. This decision was followed in the case of *Huromonee Gooptia v. Gobind Coomar Chowdhry* (u), and in the case of *Omda Khanum v.*

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(r) 3 Sel. Rep., 270.

(s) 4 Sel. Rep., 261.

(t) Suth. S. C. C., 110 ; S. C., 2 W. R. (S. C. C.), 1.

(u) 5 W. R., 51.

*Brojendro Coomar Roy Chowdhry* (v). It would thus appear that from the earliest times up to the year 1874, no claim for a reduction of interest has ever been allowed on the ground of Hindu law or usage, but on the contrary that this contention whenever raised has always been repudiated, and in several cases the Courts granted interest beyond the principal. In this respect the Courts in the province of Lower Bengal have been in no way singular. The very same point has been decided in conformity with this view in the North-Western Provinces to which the Bengal Regulations apply, and in Madras where the Regulation is of similar import.

“In the case of *Y. Annaji Rau v. Ragubai* alias *Sithabai* (w), the Court at Madras declared that in the matter of interest the Hindu law was not binding in the Mofussil. This decision was followed in the case of *Kuar Lachman Singh v. Pirbhu Lal* (x). So that there is a complete consensus of opinion in Bengal, in the North-Western Provinces, and in Madras, that since the passing of Act XXVIII of 1855, a Hindu may claim from another Hindu interest in excess of the principal. We do not refer to the cases decided in the Bombay Presidency, because, as appears from the case of *Khushalchand Lalchand v. Ibrahim Fakir* (y) the Regulations in that Presidency were different from those in Bengal and Madras. The learned Advocate-General, in support of his view that interest should not be allowed beyond the principal, has referred to the decision of *Sir Barnes Peacock* in the case of *Ram Lall Mookerjee v. Haran Chandra Dhar* (z), in which case it was

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(v) 12 B. L. R., 451.

(w) 6 Mad. H. C., 400.

(x) 6 N. W. P. (All.) H. C., 358.

(y) 3 Bom. H. C., (a.c.j.), 23.

(z) 3 B. L. R., (o.c.j.), 130.

decided that within the town of Calcutta interest as between Hindus might not exceed the principal.

"This decision, though doubted in the case of *Mia Khan v. Bibi Bibijan* (a), has been followed in a case lately decided in the Original Side of this Court, but this judgment is founded upon considerations special to the town of Calcutta, and has no application to the Mofussil."

It would seem, therefore, as the law now stands, that, except perhaps in the Presidency towns of Calcutta and Madras, where the provisions of the Charters of the late Supreme Courts are still in force, the old Hindu law as to the taking of interest is no longer applicable in Bengal, the N. W. P., or Madras. In Bombay, however, where there is a special enactment (Bom. Regulation IV of 1827, sec. 26) in force to the effect that the Courts in that Presidency are, in the absence of any specific Act of Parliament or legislation, to apply the usage of the country, and in the absence of such usage the law of the defendant, it has been held that the old Hindu law is still in force (b).

The ordinary rules regarding the allowance of interest will be followed even when the parties are both Mahomedans, whose law forbids the taking of interest. The custom of taking interest by Mahomedans, is recognised by the Courts (c): and a question as to interest, arising in a mortgage

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(a) 5 B. L. R., 500.

(b) *Khushalchand Lalchand v. Ibrahim Fakir*, 3 Bom. H. C. (a. c. j.) 23; *Narayan v. Satvaji*, 9 Bom. H. C. 83. See also *Bal-krishna Bhalchandra v. Gopal Raghunath*, I. L. R. 1 Bom., 73; *Ramchandra Mankeshwar v. Bhimrav Ravji*, I. L. R. 1 Bom., 577; *Nanchand Hansraj v. Dapusaheb Rustambhai*, I. L. R. 3 Bom., 131; *Ganpat Pandurang v. Adarji Dadabhai*, I. L. R. 3 Bom., 312; *Narayan Deshpande v. Rangutai*, I. L. R. 5 Bom. 127.

(c) *Mia Khan v. Bibi Bibijan*, 5 B. L. R., 500.



suit, is not a question of succession, inheritance, marriage, or caste or any religious usage or institution, such as the law requires should be regulated by the peculiar law of the litigant (d).

When on the accounts being adjusted, it is found that the mortgagee's claim for principal and interest has been completely satisfied, all subsequent receipts are to be considered to belong to the mortgagor, and he will be entitled to simple interest on them until they are repaid to him (e). But although the general practice of the Courts is to allow interest on mesne profits or wasilat, still it will not be given if there has been any improper delay in the institution of the suit for their recovery, or if any special ground exists for withholding it. There is no rule rendering it compulsory on the Courts to decree a specific rate of interest; a discretionary power is vested in them, in reference to the circumstances of each case (f). And mere delay is not necessarily improper delay (g).

The Bombay High Court has recently held that, though the general practice when, on taking the accounts, the mortgagee is found to have been overpaid, is to order the payment by him of the balance due to the mortgagor, with

(d) *Deen Doyal Poramanick v. Kylas Chunder Pal Chowdhry*, I. L. R. 1 Cal., 92; S. C. 24 W. R. 106. Act VI of 1871, sec. 24. See also *Sheikh Mokeem Sircar v. Turee Bibi*, S. D. A. 1848, p. 530; *Hoossein Buksh Khan v. Zuhoor Hoossein*, S.D.A. N.W.P., 1852, p. 88.

(e) *Roy Konsal Sing v. Syed Abdoolla*, S. D. A., 1853, p. 464. See also *Syud Uta-oolah Khan v. Lalla Nurain Dass*, S. D. A. N. W. P., 1855, p. 257.

(f) *Bubooee Munraj Koomvuree v. Hunooman Pershad Pande*, S.D.A. N.W.P., 1853, p. 228; *Bhugwan Doss v. Mooftee Muhummed Hossein*, S.D.A. N.W.P., 1855, p. 8.

(g) *Meer Ali v. Mukdoom Buksh*, S.D.A. N.W.P., 1854, p. 368; *Ramrutton Roy v. Bhoobnessuree Debea*, S.D.A., 1855, p. 404.

interest from the date of the institution of the suit, yet this rule should not be applied in the case of redemption suits instituted under the Dekkhan Agriculturists' Relief Act, 1879, when the terms of the mortgage contract between the parties are set aside for the purpose of taking the account under the provisions of sec. 13 of the Act. Its application would not only lead to the redemption of the mortgaged land contrary to the terms and conditions of the contract, but would in many cases oblige the mortgagee to refund money which had rightly come into his hands under the contract (*h*).

Any agreement made by the parties as to the manner of accounting will be enforced, if not in itself illegal. Thus, if they have agreed that the residue of the sums received from the land, after payment of interest, shall be carried to liquidation of the principal and the account closed to the end of each year, the accounts must be taken in this manner (*i*).

Where, moreover, the parties were willing to dispense with an account of rents and profits on the one side and of interest on the other, and acquiesced in the course adopted by the Subordinate Court, namely, that of allowing interest for six years on the principal sum due, the Bombay High Court refused to interfere with the order of that Court in this respect (*j*).

In cases to which the usury laws are applicable, and where there is no agreement that a less rate shall be taken, the Courts may allow interest at the rate of twelve per

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(*h*) *Janoji v. Janoji*, I. L. R. 7 Bom. 185.

(*i*) *Radhabenode Misser v. Kripa Moyee Debea*, 14 Moore's I. A., 443 (*cf.* p. 451); S. C. 10 B. L. R., 386 (*cf.* p. 393); *Durbaree Lal Sahoo v. Baboo Ram Nurain Singh*, S. D. A., 1848, p. 549; *Rajah Tej Singh v. Lall Man Singh*, S. D. A. N. W. P., 1855, p. 22.

(*j*) *Lakshman Bhisaji Sirsekar v. Hari Dinkar Desai*, I. L. R. 4 Bom. 584.

cent. per annum. But they are not bound to award twelve per cent.; that is the highest rate which they can give, and though it may be the general understanding of the country that twelve per cent. should be awarded on deeds containing no stipulation for a lower rate, still this general custom may be departed from (*k*). In cases to which the usury laws are not applicable, the Courts will allow interest at the rate stipulated for in the contract: or if no rate of interest shall have been stipulated for, and interest be payable under the terms of the contract, at such rate as is deemed reasonable (*l*).

In a case on a mortgage in which the Court of first instance, in exercise of the discretion given by sec. 194 of Act VIII of 1859, gave a decree making the amount awarded payable by instalments (*m*), and gave no interest after the institution of the suit, the rate of interest contracted for in the mortgage bond being 24 per cent., and when the Appellate Court amended the decree by allowing interest at the rate of 6 per cent. only from the date of the institution of the suit, the Bombay High Court held that, although the rate stipulated for was properly awardable, the award of the lower Court was not illegal, or beyond the competence of that Court, and consequently declined to

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(*k*) *Rajah Saheb Perladh Singh Bahadoor v. Broughton*, 24 W. R., 275; *Mouzzum Alee v. Musst. Wajidah*, S.D.A., 1852, p. 748; *Bubooee Munraj Koonwuree v. Hunooman Pershad Pande*, S.D.A. N.W.P., 1853, p. 228; *Meer Ali v. Mukdoom Buksh*, S.D.A. N.W.P., 1854, p. 368; *Rajah Tej Singh v. Lall Man Singh*, S.D.A. N.W.P., 1855, p. 22; *Sheo Munog Singh v. Syud Khadim Hoosseini*, S.D.A. N.W.P., 1855, p. 684. See also *Baboo Goordass Roy v. Baboo Ramruttun Roy*, S. D. A. 1854, p. 518.

(*l*) Act XXVIII of 1855, sec. 6.

(*m*) As to the power of a Court to pass such a decree on a mortgage bond, see *ante* pp. 457, 458.

interfere with its discretion, or allow the rate contracted for (n).

But it has been held by the Madras High Court in a late case, in which reference was made to the Bombay decision above noted, that as sec. 209 of the Code of Civil Procedure (Act X of 1877) does not expressly refer to suits in which interest has been contracted for, the contract rate of interest must be allowed in all cases up to the date of decree, in accordance with sec. 2 of Act XXVIII of 1855 (o); and the Calcutta High Court has also recently ruled that in a suit on a mortgage bond the plaintiff is entitled, if the bond be genuine, to recover the agreed rate of interest without any deduction (p).

Any stipulation by which the mortgagee agrees to take interest at a rate lower than twelve per cent. will be binding on him. And where he has consented to take the usufruct of the land in lieu of interest, he cannot claim interest at the legal rate or otherwise, on the ground of the usufruct having fallen short of the legal or any other rate (q). In usufructuary mortgages the law requires an account of the proceeds in order to prevent the mortgagee receiving more than his principal with interest at twelve per cent. If the proceeds do not give what is equivalent to interest at that rate, and no other rate is stipulated for, "the presumption is that the usufruct was deemed by the mortgagee sufficient interest for the money debt, and the mortgagor is

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(n) *Carvallo v. Nurbibi*, I. L. R. 3 Bom. 202.

(o) *Bandaru Swami Naidu v. Atchayamma*, I. L. R. 3 Mad. 125.

(p) *Futtehma Begum v. Mohamed Ausur*, I. L. R. 9 Calc. 309 (*cf.* p. 314).

(q) *Shunker Singh v. Chowdhuree Kurreem Yar*, S.D.A. N.W.P. 1852, p. 307; *Shujaet Ali v. Dutram*, S.D.A. N.W.P. 1853, p. 178; *Jugguputty Singh v. Rughooburdyal*, S. D. A. 1852, p. 678.

not bound to pay a further sum, to make up any particular rate" (r).

In the case of a non-usufructuary mortgage, interest not being expressly stipulated for, the mortgagee was held to be entitled to interest only from the date upon which the loan became re-payable (s). And in another case, interest was allowed only from the date of suit, until realisation of the principal sum decreed (t).

Interest above the rate of twelve per cent. per annum is not to be allowed in the case of contracts entered into before Act XXVIII of 1855 came into force. And compound interest, arising from intermediate adjustments of accounts, is not to be given in such cases. But this rule does not apply where accounts between the parties have been adjusted, and the former bonds or agreements have been cancelled and new bonds or agreements taken for the aggregate amount of principal and interest consolidated into principal (u).

In one case the accounts were prepared on the principle of striking a balance of interest at the close of the year, deducting the principal of all payments by the debtor from the principal of the debt, and setting off only the interest accruing to the debtor on his payments during the year, against the interest becoming due on the principal debt.

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(r) *Mohree Bebee v. Nuseer Mohummud* S. D. A., 1860, vol. 2, p. 223; *Raja Juggut Singh v. Kasim Ali*, S.D.A. N.W.P., 1848, p. 417.

(s) *Baboo Juggutputtee Singh v. Madho Singh*, S. D. A., 1855, p. 54.

(t) *Hinga Mull v. Syud Mooreed Ushruf*, S.D.A. N.W.P., 1855, p. 363.

(u) Ben. Reg. XV. of 1793, ss. 4, 7, 8; Ben. Reg. XXXIV of 1803, ss. 3, 6; Ben. Reg. XVII of 1806, s. 2; Mad. Reg. XXXIV of 1802, ss. 2, 5, 6, as modified by Mad. Reg. II of 1825, s. 7, (all repealed by Act. XXVIII of 1855); *Roy Kousol Singh v. Syed Abdoolla*, S.D.A., 1852, p. 1021; *Baboo Hunnooman Pershad v. Rajah of Vizianagram*, S.D.A. N.W.P., 1856, p. 175.

The Court held that this was wrong, and that the debtor was entitled to have all sums credited to him during the year, applied first to the liquidation of interest, and the surplus only, remaining after such liquidation of interest, carried to the reduction of the principal (*v*).

Under Act XXVIII of 1855, a contract by which it is agreed that the use or usufruct of any property shall be allowed in lieu of interest, is binding upon the parties; and interest is to be calculated at the rate stipulated in the contract, or if no rate of interest has been stipulated for, and interest be payable under the terms of the contract, at such rate as the Court shall deem reasonable (*w*).

The mortgagee is required to deliver accounts of his gross receipts and of his expenditure, and it is a positive duty that he should do so (*x*). Moreover, the accounts rendered must be full and complete, and the Judge must not rest contented with a mere rough abstract of the receipts during the time the mortgagee has been in possession (*y*).

Speaking of the duty (under Ben. Reg. XV of 1793) of the mortgagee in possession to keep accounts, the Privy Council said in the case of *Shah Mukhun Lall v. Baboo Sree Kishen Singh* that the duty of the mortgagees "was to keep an account of the gross receipts from the property mortgaged and also the expenses of management and preservation. Some difficulties might attend a very rigid

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(*v*) *Roy Konsal Sing v. Syed Abdoolla*, S. D. A., 1853, p. 464.

(*w*) Act XXVIII of 1855, ss. 4, 6.

(*x*) *Roocheehes Doobe v. Mussumat Soghra Beebee*, S.D.A. N.W.P., 1852, p. 68; *Pursram v. Dhurm Dass*, S.D.A. N.W.P., 1852, p. 511; *Musst. Jinnutoonnissa v. Ajaeb Singh*, S.D.A., 1856, p. 328; *Petition No. 1803 of 1855*, S. D. A., 1856, p. 522; *Baboo Juggutputtee Singh v. Shah Rogoburdyal*, S. D. A., 1857, p. 1512. Ben. Reg. XV of 1793, s. 11; Ben. Reg. XXXIV of 1803, s. 10; Ben. Reg. XVII of 1806, s. 2; and Mad. Reg. XXXIV of 1802, s. 9.

(*y*) *Soobdan Doobe v. Buksh Ali*, S.D.A. N.W.P., 1850, p. 244; and compare the Transfer of Property Act, 1882, s. 76, cl. (*g*.)

compliance with the Regulation. Their Lordships desire to enforce by everything which may fall from them on the subject, the duty, as well as the policy and prudence of keeping as full, complete and plain an account of the transactions attending the management and receipts of an estate mortgaged as the nature of the case will admit. It is obvious, however, that the language of the section which applies to the common case must receive a construction such as may suffice to accommodate its strict salutary provisions to the variable and different natures of estates and possession. The gross receipts must be such as the mortgagor himself, previous to the mortgage, would have been entitled to; and if he could not, by reason of an intervening lease, call for the account of the collections, neither can his mortgagee. Also, if at the time of the mortgage a valid engagement, not designed to exclude accounting, is made by common consent qualifying the nature of the usufructuary possession, the account of the receipts must be subject to that modification. The terms of the law are evidently not inflexible terms. And in like manner must be construed the provision as to the truth of the accounts, which provision must necessarily be flexible like the former. For the mortgagee is to verify only his gross receipts and his expenditure, *not* the rents, nor the extent of arrears, nor the causes of the arrears. He is not in fact directed *then* to make out and verify such an account as might be established against him in a hostile suit, —but only his gross receipts and his expenditure” (z).

In accounting, the mortgagee must give an account of the *bonâ fide* proceeds of the estate while in his possession. *Jumma-wasil-bakee* papers, and other such like papers, are

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(z) 12 Moore's I. A. 157, (cf. p. 195), S. C. 2 B. L. R., (P. C.) 44 (cf. p. 55). See also *Rajah Sahab Perladh Singh Bahadoor v. Broughton*, 24 W. R. 275.



not *per se* a sufficient account within the meaning of Ben. Reg. I. of 1798, sec. 3, but these papers may be used in corroboration of a properly framed account. In one case the Court said, the *jumma-wasil-bakee* papers "are not, and cannot be, the account itself. The account which the mortgagee has by law to put into Court, is not that of his agent or *tehsildar*, given by the latter for his master's (the mortgagee's) information as to such agent's collections. The *jumma-wasil-bakee* paper, however, is this latter only. The accounts to be put in under the law are to be made, verified and proved by the mortgagee himself." The Court after saying that *jumma-wasil-bakee* papers and the like might well be adduced to support the mortgagee's own account when duly made and filed, continued: "The account required from the mortgagee is one setting forth what he has realised,—from what portions of the mortgaged property,—in what terms or periods,—with what loss and gain on the several assets,—with what necessary reductions,—and what remains then as the net profits which can be taken as actual realisations toward liquidating the sum due under the mortgage" (a).

The mortgage being of a fractional share of a joint estate managed by common servants of all the sharers, the mortgagee put in an account shewing what he had actually received from first to last, and swore to the correctness of it. The general accounts of the estate were called for, and produced by one of the joint proprietors, in whose hands they were. It was held that these accounts would ordinarily be in themselves sufficient, but that, in the particular case, further inquiry was necessary. And the Court declared it to be the duty of a mortgagee of a fractional share of

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(a) *Goluck Chunder Dutt v. Mohun Loll Sookul*, 5 W. R. 271. See also *Shah Ameeroodeen v. Ram Chand Sahoo*, 5 W. R. 53; and *Mokund Lall Sookul v. Goluck Chunder Dutt*, 9 W. R. 572.

an estate held in joint tenancy to see that he received out of the estate all that the mortgagor ought to have received, and to see not only that the assets are realised but that the expenses are carefully regulated (*b*).

The mortgagee must swear, or if he is a person exempted from taking oaths, must subscribe a solemn declaration, that the accounts delivered are true and correct (*c*). But the Regulation must be construed reasonably, as necessarily admitting of some delegation in the person deputed to prepare and attest the accounts. And it is enough if they are prepared and attested by the mortgagee's general manager who has been in charge of the matter and is better acquainted with all details than is the mortgagee himself (*d*). Native ladies, whose attendance in Courts of justice is usually dispensed with, are not obliged to appear in Court to swear to the truth of the accounts prepared by their agents. The oath of the agent is all that is required (*e*).

When there are several joint mortgagees, the oath of one or more of them, competent to discharge the duty, is sufficient in regard to the *prima facie* admission of the accounts. How far such accounts are deserving of credit, is another question (*f*).

(*b*) *Mirza Ali Reza v. Tarasoodere*, 2 W. R. 150.

(*c*) Ben. Reg. XV of 1793, s. 11 ; Ben. Reg. XXXIV of 1803, s. 10 ; Ben. Reg. XVII of 1806, s. 2 ; and Mad. Reg. XXXIV of 1802 s. 9. See also Act VI of 1872 "The Oath's Act."

(*d*) *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 12 Moore's I. A. 157 (*cf.* p. 198) ; S. C. 2 B. L. R. (P. C.) 44 (*cf.* p. 57).

(*e*) *Syud Wazeer Ulee v. Jugmohun Singh*, S.D.A. N.W.P., 1854, p. 465.

(*f*) *Ibid.* And see *Mussumat Luckmun Koor v. Cheda Loll*, S.D.A. N.W.P. 1855, p. 318.

In a case in which the oath of the gomastah of the mortgagee was by consent taken in the lower Court as sufficient, the Sudder Court refused to listen to the objection that the mortgagee himself ought to have sworn (*g*).

It has been said that when a mortgagee, who has ceased to be in possession, sues to recover a balance from the mortgagor, he is not bound to swear to the accounts. These may possibly be no longer in his possession (*h*).

A mortgagee who evades the rendering of the required accounts, or who improperly refuses to depose to the truth of those rendered, is guilty of misconduct which may be taken into consideration on the question of costs (*i*). And in such a case, any reasonable proof, even if offered by the mortgagor (*j*), may be accepted by the Court. In one instance, a mortgagee in possession had applied to the Collector to have a renewal of the settlement of the estate made in his name, and sent in *doul* papers along with his application, praying to be admitted to engage for the estate at the jumma therein specified. These papers when produced afterwards by the mortgagor, were held to be sufficient evidence as against the mortgagee who had failed to furnish any proper account (*k*). So an account prepared

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(*g*) *Mussumat Luchmun Koor v. Cheda Loll*, S.D.A. N.W.P., 1855, p. 318.

(*h*) *Ibid*.

(*i*) *Roohcheehee Doobe v. Mussumat Soghra Beebee*, S.D.A. N.W.P., 1852, p. 68; *Baboo Kullyan Dass v. Baboo Sheo Nundun Purshad Singh*, 18 W. R. 65.

(*j*) But see *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 12 Moore's I. A. 157 (cf. pp. 195 and 198); S. C. 2 B. L. R. (P. C.) 44 (cf. pp. 55, 57); *Radhachurn Chatterjea v. Rajchunder Mullick*, S. D. A. 1858, p. 727; *Musst. Zenut Begum v. Musst. Waheedun*, S. D. A. 1858, p. 1235; *Sheikh Bukhtour v. Syud Turrahum Hossein*, S. D. A. 1859, p. 270; *Shumsoodeen v. Roy Hurnarain*, S. D. A., 1859, p. 812. See also *Sirdar Golab Singh v. Ram Buddun Sing*, 6 W. R. 127.

(*k*) *Pursram v. Dhurm Dass*, S.D.A. N.W.P., 1852, p. 511.

by an Ameen on the spot, from local inquiry, has been held to be a good basis on which to proceed, and to be sufficient as against the mortgagee who withheld his accounts (l).

It is a very common practice, when there are disputes as to the items of the account, for an Ameen to make out a statement of the collections, from investigation made by him on the ground; and when this is done, the collections are to be assumed as estimated by him, unless objections are at once taken to his report. And it is not proper to put aside the Ameen's report to which no objection has been taken by the parties, and to accept the rent-roll as the basis of the accounts. Nor is the rent-roll admissible as conclusive evidence, when the party in possession has filed his papers showing the amount collected (m).

The account will be taken on the footing of village papers regularly filed by the mortgagee and not objected to at the time by the mortgagor, unless very good reason is shown for putting these accounts aside and proceeding on other and independent data (n). If the mortgagee has not kept accounts, or has kept them badly, the presumption in everything will be against him (o). But if the mortgagee

(l) *Kunkhoochurn Mytee v. Muddun Pundeh*, S. D. A., 1848, p. 346. And see *Musst. Jinnufoonnissa v. Ajaeb Singh*, S. D. A., 1856, p. 328; *Baboo Juggutputtee Singh v. Shah Rogoburdyal*, S. D. A., 1857, p. 1512; *Solano v. Bahadoor Ally Khan*, S. D. A., 1862, vol. I, p. 51; *Anundgopal Sohay v. Gopal Dass*, S. D. A., 1862, vol. I, p. 57.

(m) *Musst. Hurdoorga Chowdraine v. Kaleenath Bhoomeeek*, S. D. A., 1852, p. 831; and see *Prankissen Roy Chowdhooary v. Gopeekissen Roy Chowdhooary*, S. D. A., 1860, vol. I, p. 238.

(n) *Sheo Munog Singh v. Syud Khadim Hoossein*, S.D.A. N.W.P., 1855, p. 684.

(o) *Ibid.* See also *Jowahir Singh v. Chowbe Beeharee Loll*, S.D.A. N.W.P., 1855, p. 378; *Sirdar Golab Singh v. Ram Buddun Singh*, 6 W. R. 127. See *Jodoonauth Roy v. Ram Buksh Chulungee*, 8 W. R. 203; *Shah Gholam Nuzuf v. Mussamut Emanum*, 9 W. R. 275.

does not file proper accounts, it does not follow that those of the mortgagor are necessarily to be taken as correct without any inquiry (*p*); and presumptions, even in *odium spoliatoris* have known reasonable limits, and must not be conjectures nor grounded on data which are evidently incorrect (*q*).

The mortgagee having rendered and sworn to the truth of his accounts, the Court will permit the mortgagor to examine them, and after hearing his objections, will proceed to take evidence on both sides. But the objections of the mortgagor must be specific and distinct as to each item intended to be disputed: and a mere general charge of falseness and inaccuracy will not be attended to (*r*).

A Judge is not bound to adopt the accounts which he believes to be false, either of one party or of the other; but rejecting the detailed accounts furnished, he may on some equitable principle fix a sum, according to his best judgment, as the amount of the annual produce. And in one case, where the Judge, doubting the accounts of both parties, valued the lands at the sum assessed on them by the Collector during a period of temporary resumption, the Court considered this an equitable mode of calculation, and confirmed it (*s*).

(*p*) *Debedeen v. Dhurm Dass*, S. D. A. N. W. P., 1854, p. 352; *Shah Coondon Lal v. Balgobind Singh*, S. D. A., 1858, p. 756.

(*q*) *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 12 Moore's I. A. 157 (*cf.* p. 198); S. C. 2 B. L. R. (P. C.) 44 (*cf.* p. 57).

(*r*) Ben. Reg. XV of 1793, sec. 11; Ben. Reg. XXXIV of 1803, sec. 10; Ben. Reg. XVII of 1806, sec. 2; and Mad. Reg. XXXIV of 1802, sec. 9; *Baboo Moonma Lall v. Gungapershad*, S. D. A. N. W. P., 1851, p. 32; *Meer Boonyad Ali v. Hursuhasee*, S. D. A. N. W. P., 1852, p. 607; *Bhageruth v. Mulik Riyazut Hoosein*, S. D. A. N. W. P., 1853, p. 107.

(*s*) *Shib Lall v. Hafiz Mahmood Khan*, S. D. A. N. W. P., 1849, p. 317.

But the valuation put upon the lands by the Judge must be founded on some distinct tangible ground, and not on mere conjecture or guess. Thus, when the lower Court disallowed the rent entered against certain lands in the yearly rent-roll filed in the Revenue office, and assumed in its place a conjectural rate obtained from an average of the several rent rates leviable from the other lands in each of the mouzahs which were the subject of the suit, it was held that the average struck in such a manner must be purely arbitrary, and that the enhanced rate fixed on such uncertain grounds, and unsupported by evidence, could not be maintained (t).

The *nikasee* accounts annually given in by the putwarree furnish a valuable test of the accuracy of the accounts and papers filed by the parties, and a Judge may with great propriety refer to them (u). But though they are useful as a test, they are not indispensably necessary, when the details furnished by the mortgagee fully enable the Court to proceed to an adjustment without them. And although the Judge may refer to them of his own accord, in order to check accounts given in by the parties, a decree of which they are the sole foundation is bad, unless they have been regularly filed in the suit; the Judge must not of his own accord send for them to the Revenue office, and from them alone make out an account (v).

The mortgagee (who had been in possession under an usufructuary mortgage of date prior to Act XXVIII of 1855) did not produce any proper account of his gross

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(t) *Bhageruth v. Mulik Riyazut Hoosein*, S.D.A., N.W.P., 1853, p. 107. And see the cases referred to, *ante* at pp. 566, 567, notes (o), (p), (q).

(u) *Soohdan Doobe v. Buksh Ali*, S.D.A. N.W.P., 1850, p. 244; *Baboo Moonna Lall v. Gungapershad*, S.D.A. N.W.P., 1851, p. 32.

(v) *Roocheeshee Doobe v. Mussumat Soghra Beebee*, S.D.A. N.W.P., 1852, p. 68.

collections and expenditure. The mortgagor, who was suing to redeem, examined putwarrees and gomastahs employed by the mortgagee to collect the rents, and a large number of tenants, to prove the collections in each year; and the putwarrees produced the *jummabundee* papers and proved them. The mortgagee gave no counter-evidence. The Court accepted the *jummabundee* papers as genuine, supported as they were by a large body of oral evidence, and directed that the accounts between the parties should be adjusted upon the basis of these *jummabundee* papers (*w*).

If the mortgagee makes an admission in his pleadings as to the amount of his receipts from the land, believing it at the time to be for his own benefit, he will not afterwards be allowed to contradict or to explain away the statements he has so made (*x*).

As a general rule, the Court will give the mortgagor credit for every sum entered in the accounts rendered by the mortgagee as realised, and will not allow the latter to repudiate any such sum on the ground of its being an illegal cess, or payment which could not have been enforced. On the other hand, such illegal payments, when not admitted by the mortgagee, cannot be allowed; and the mortgagor will not be permitted to go into proof of them (*y*). But although the mortgagor will not be credited with sums derived from *haut* or market tolls, he is nevertheless entitled to credit for the rent of the land on which the *haut* or market was held (*z*).

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(*w*) *Rajah Saheb Perladh Singh Bahadoor v. Broughton*, 24 W.R. 275.

(*x*) *Hunooman Pershad Pande v. Babooee Munraj Koonwuree*, S.D.A. N.W.P., 1853, p. 225; *Chowbey Hurbuns Rae v. Chowdree Petum Singh*, S.D.A. N.W.P., 1854, p. 371.

(*y*) *Maharaj Nuwal Kishore Singh v. Syud Inyut Ali*, S.D.A. N.W.P., 1852, p. 248; *Shujaet Ali v. Dutram*, S.D.A. N.W.P., 1853, p. 178; *Radha Mohun Ghose Chowdry, Petitioner*, Rep. Sum. Cases, 10th Feb. 1846.

(*z*) *Radha Mohun Ghose Chowdry, Petitioner*, Rep. Sum. Cases, 10th Feb. 1846.



The gross receipts referred to in the Regulations are the gross sums paid by the tenantry of the estate mortgaged, not merely what actually reaches the mortgagee's hand. And if he creates a middle-man between himself and the tenants this does not exonerate him from the liability to account for the gross receipts (a). He must answer for the rents appearing in the *jummabundee*, and not merely for his actual collections: but he will of course only be liable for the amount realised, if he can show good reason for not having realised the whole rent-roll exhibited in the *jummabundee* (b). If the land is held by under-lessees by virtue of leases granted prior to the mortgage being made, so that the mortgagee has not in fact had the full usufruct of it, the mortgagor is to be credited only with the net profits received by the mortgagee (c). So if the estate, though nominally in the hands of the mortgagee, is actually managed by the mortgagor (d).

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(a) *Sheochurn Lall v. Soorja Koonwur*, S.D.A., 1852, p. 1137. See also *Baboo Juggutputtee Singh v. Shah Rogoburdyal*, S.D.A., 1857, p. 1512. See also *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 12 Moore's I.A., 157, (cf. p. 195); S.C. 2 B.L.R. (P.C.) 44 (cf. p. 55). And see *ante*, pp. 561, 562.

(b) *Rajah Heera Singh v. Sahoo Luchmun Dass*, S.D.A. N.W.P., 1853, p. 564; *Chokey Lall v. Kulean Dass*, S.D.A. N.W.P., 1854, p. 159; *Meer Booniad Ali v. Deendyal*, S.D.A. N.W.P., 1854, p. 201; *Synd Wuzeer Ulee v. Jugmohun Singh*, S.D.A., N.W.P., 1854, p. 465; *Khyaleeram v. Ramdyal*, S.D.A. N.W.P., 1855, p. 51; *Sheikh Ubbas v. Sheikh Sahib Ulee*, S.D.A. N.W.P., 1855, p. 355; *Runjeet Singh v. Musst. Dhookhin Acharaj Koonwur*, S.D.A., 1858, p. 1847; *Jhujjoo Sahoo v. Hurruckchand Sahoo*, S.D.A., 1860, vol. I, p. 639. See also *Mirza Ali Reza v. Tarasonderee*, 2 W.R. 150.

(c) *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 12 Moore's I.A. 157; S.C. 2 B.L.R. (P.C.) 44; *Bhageruth v. Mulik Riyazut Hoosein*, S.D.A. N.W.P. 1853, p. 107; *Mussumat Ranees Sengur v. Mussumat Ranees Rugsel*, S.D.A. N.W.P., 1853, p. 112; *Rajah Heera Singh v. Sahoo Luchmun Dass*, S.D.A., N.W.P., 1853, p. 564.

(d) *Baboo Gopal Doss v. Charles Hollier*, S.D.A. N.W.P., 1856, p. 115.

If the mortgagee has actually cultivated the land himself, he must account for the fair rent of the land. But he need not account for the extra profit made by him by reason of having himself cultivated. He need account only for such profits as the mortgagor would have realised had he let out the property (e).

It has been already seen, that the mortgagee is responsible for gross mismanagement, or for waste committed by him (f). If he chooses improperly to record lands as rent-free, which are not so, he will be charged with the full rent which they would have brought in (g). And a clause in a mortgage deed to the effect that an allowance shall be made to the mortgagee "for losses," has been held to apply only to losses beyond his control, and not to arrears which he has wilfully or by negligence allowed to remain outstanding (h).

All expenses fairly incurred in respect of the property will be credited to the mortgagee. He will be allowed a charge for the wages of chowkeydars and putwarrees, which form regular items in village expenses altogether independent of the will of the mortgagee (i). But those payments only will be allowed which have been *bonâ fide* made: and therefore where the possession of *jagheer*, or service land, by the chowkeydars of each mouzah, was shown by the entries of rent-free lands under their names in the yearly

(e) *Rughoonath Roy v. Barail Geeredharee Singh*, 7 W. R. 244; and compare the Transfer of Property Act, 1882, s. 76, cl. (h).

(f) *Supra* pp. 282, 283.

(g) *Bhyroo Singh v. Nuthoo Singh*, S.D.A. N.W.P., 1854, p. 525.

(h) *Chokey Lall v. Kulean Dass*, S.D.A. N.W.P. 1854, p. 159.

(i) *Maharaj Nuwul Kishore Singh v. Syud Inayut Ali*, S.D.A. N.W.P., 1852, p. 248; *Moolkund v. Mussamat Deokoover*, S.D.A. N.W.P., 1852, p. 477; *Bhageruth v. Mulik Riyazut Hoossein*, S.D.A. N.W.P., 1853, p. 107; *Rajah Heera Singh v. Sahoo Luchmun Dass*, S.D.A. N.W.P., 1853, p. 564.

*jummabundees*, a charge for chowkeydars was struck out of the mortgagee's account (*j*).

The reasonable costs of collection and management will also be allowed; and the percentage for collection is charged on the gross rental, and is usually considered to cover ordinary balances (*k*).

When a house is mortgaged, the mortgagee is entitled to charge the mortgagor with reasonable and necessary repairs (*l*).

Where however both parties were willing to dispense with an account, it was held by the Bombay High Court that the mortgagees were not entitled to credit for costs of repairs, inasmuch as such costs were necessarily incident to the enjoyment of the profits, for which they had not been called on to account (*m*).

(*j*) *Bhageruth v. Mulik Riyazut Hoosein*, S.D.A. N.W.P., 1853, p. 107. And see generally as to what will be allowed, *Meer Booniad Ali v. Deendyal*, S.D.A. N.W.P., 1854, p. 201; *Chowbey Hurbuns Rae v. Chowdree Petum Singh*, S.D.A. N.W.P., 1854, p. 371; *Sheikh Ubbas v. Sheikh Sahib Ulee*, S.D.A. N.W.P., 1855, p. 355; *Jowahir Singh v. Chowbe Beeharee Loll*, S.D.A. N.W.P., 1855, p. 378.

(*k*) *Moolchund v. Mussumat Deokoower*, S.D.A. N.W.P., 1852, p. 477; *Mussumat Ranee Sengur v. Mussumat Ranee Rugsel*, S.D.A. N.W.P., 1853, p. 112; *Rajah Heera Singh v. Sahoo Luchmun Dass*, S.D.A. N.W.P. 1853, p. 564; *Chowbey Hurbuns Rae v. Chowdree Petum Singh*, S.D.A. N.W.P., 1854, p. 371; *Khyaleeram v. Ramdyal*, S.D.A. N.W.P., 1855, p. 51; *Raghnath v. Luchmun Singh*, 1 N.W.P. (Agra), H.C. 132; *Mokund Lall Sookul v. Goluck Chunder Dutt*, 9 W.R. 572, (*cf.* p. 575). And compare the Transfer of Property Act, 1882, s. 72, cl. (*a*).

(*l*) *Jogendronath Mullick v. Raj Narain Paloooye*, 9 W.R. 488; *Ameer-ool-lah v. Ram Dass*, 2 N.W.P. (Agra), H.C. 187. And compare the Transfer of Property Act, 1882, s. 76, cl. (*d*).

(*m*) *Lakshman Bhisagi Sirsekar v. Hari Dinkar Desai*, I.L.R. 4 Bom. 584.

Moreover where the agreement between the parties in the matter of repairs is stated in the bond, it is not competent for the Court to go outside that instrument (*n*).

A mortgagee is to be allowed all payments in respect of Government revenue made by him while in possession; and this, whether the revenue fell due after the making of the mortgage, or before it, the mortgagee being entitled to do anything which it is the duty of the mortgagor to do in order to preserve the estate (*o*). But if it has been expressly agreed that these charges shall be borne by the mortgagee, he will, of course, not receive credit for them in passing his accounts (*p*). Nor, on the other hand, will he be debited with anything for which it has been specially agreed he shall not be liable (*q*).

A mortgagee who, being in possession, lets the estate fall into arrears, in consequence of which the Collector enters on the land for a time, must account for the full profits of the whole of that period, just as if he had never been disturbed in his possession,—it being his duty, in the absence of an express stipulation to the contrary, to pay the Government revenue before disbursing any other

(*n*) *Narayan Deshpande v. Rangubai*, I.L.R. 5 Bom. 127 (*cf.* p. 129).

(*o*) *Kunhoochurn Mytee v. Muddun Pundeh*, S.D.A., 1848, p. 346; *Musst. Beejee Wuheedun v. Hakeem Abooul Hossein*, S.D.A., 1852, p. 1063; *Syud Kuramut Ali v. Syud Imdad Ali*, S.D.A. N.W.P., 1852, p. 7; *Nurjoon Sakoo v. Shah Moozeerooddeen*, 3 W. R. 6; *Joyprokash Roy v. Oorjhan Jha*, 3 W.R. 174. See, however, *Doolar Chunder v. Damoodar Narain*, 3 W. R. 162. And compare the Transfer of Property Act, 1882, sec. 76, cl. (*c*).

(*p*) *Hunooman Pershad Pande v. Buboee Munraj Koonwuree*, S.D.A. N.W.P., 1853, p. 225.

(*q*) *Moolchand v. Mussumat Deokoower*, S.D.A. N.W.P., 1852, p. 477; *Chokey Lall v. Kulean Dass*, S.D.A. N.W.P., 1854, p. 159.

sum (r). And this is so, even when the balance did not originally accrue from his own personal default, but arose from the default of the owners of other lands, which together with those mortgaged formed a single undivided mehal, every portion of which was responsible for the revenue due in respect of the whole. The possibility of the proprietor of one mouzah being called upon to make good arrears unpaid by the proprietor of the other, necessarily arose out of the nature of the tenure, and was one for which the mortgagee was as much bound to provide, as for the revenue payable in respect of the mouzah which was pledged to him (s).

But the mortgagee will not be liable if the default, though nominally made by him, is in reality that of the mortgagor (t).

In a recent Allahabad case the facts were that by the terms of an usufructury mortgage it was provided that the annual profits of the mortgaged property should be taken to be a certain amount; that out of this amount the revenue should be paid annually by the mortgagee; that the balance should be taken by the mortgagee as representing interest on the principal amount of the mortgage-money; and that the mortgage should be redeemed on payment of the

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(r) *Rajah Juggut Singh v. Kasim Ali*, S.D.A. N.W.P., 1848, p. 417. See also *Syud Kuramut Ali v. Syud Imdad Ali*, S.D.A. N.W.P., 1852, p. 7; *Syud Wuseer Ulee v. Jugmohun Singh*, S.D.A. N.W.P., 1854, p. 465; *Bhugwan Doss v. Mussumat Maryum Beebee*, S.D.A. N.W.P., 1855, p. 553. And compare the Transfer of Property Act, 1882, sec. 76, last paragraph.

(s) *Syud Khadim Hossein v. Sheo Munoj Singh*, S.D.A. N.W.P., 1854, p. 164. See also *Asalut Beebee v. Collector of Behar*, S.D.A., 1855, p. 31; *Musst. Sonekolee Koonwur v. Sheikh Ezhar Hossein*, S.D.A., 1855, p. 44.

(t) *Baboo Gopal Doss v. Charles Hollier*, S.D.A. N.W.P., 1856, p. 115.

principal of the mortgage-money in a lump sum.\* It was further agreed that the mortgagor should not be entitled to claim mesne profits, nor the mortgagee to claim interest. In a suit for possession by redemption of the mortgaged property, and for surplus profits, or for possession of the mortgaged property on payment of any sum which might be found due, in which the plaintiff alleged that he had purchased the equity of redemption of the mortgaged property, that since the purchase the mortgagee had not paid any revenue, and therefore he, the plaintiff, had been compelled to pay it, and that consequently the mortgage-money had been paid out of the profits of the mortgaged property and a surplus was due, it was held that, as it was clear that the defendant mortgagee had full notice of the acquisition of the mortgagor's rights by the plaintiff, and that the plaintiff had had to pay the annual *jama* to Government for the mortgaged land, the plaintiff was entitled in equity, while suing for redemption, to take into account the amount of the annual *jama*, which by reason of the mortgagee's default he had to pay, and to calculate it against the principal sum due on the mortgage; that in accounting he was entitled to avail himself of annual rests at the times when the Government revenue for each year was payable by the mortgagee; and that any payments which the mortgagee might have made to the original mortgagor on account of revenue after the purchases were improperly made, and could not be taken into account against the plaintiff (u).

If the nature of the mortgage agreement is such that there is an annual payment to be made to the mortgagor, and these payments are allowed to fall into arrear, the law of limitation will have effect: and the mortgagor cannot, when the accounts are taken in a case to which the old law

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(u) *Jaigiti Rai v. Gobind Tiwari*, I.L.R. 6 All. 303.

of limitation is applicable, be allowed credit for sums which became due more than twelve years previous to the institution of the suit. Therefore when the contract was that the mortgagee should pay an annual rent of forty rupees to the mortgagor, but no payment was in fact made for many years, the mortgagor was credited with rent for twelve years only, his claim for the rest that was due being barred (*v*).

In a redemption suit, which came before the Bombay High Court, when the defendant admitted that he was in possession of the property as a mortgagee under the plaintiff, but refused to put in evidence the mortgage-deed which was insufficiently stamped, the Court held that, in taking the account, it lay upon the mortgagee to prove what was due from the plaintiff in respect of principal and interest, and therefore the mortgagee could only be credited in the account with the sum which the plaintiff admitted to be the amount of the principal, and must be debited with the income derived from the land since he had been in possession (*w*).

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(*v*) *Bibee Roufun v. Sheikh Majum Ali*, S.D.A., 1850, p. 205.

(*w*) *Ganga Mulik v. Bayaji*, I.L.R. 6 Bom. 669.



## CHAPTER XI.

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### OF MOFUSSIL MORTGAGES IN THE HIGH COURT (a) AS A COURT OF ORIGINAL JURISDICTION.

HAVING sketched the law which governs mortgages in the Mofussil Courts (and consequently in the High Court also as a Court of appeal from them) in cases to which the Transfer of Property Act, 1882, does not apply (b), it remains to add a few words on the law as administered in such cases in the High Court as a Court of ordinary original civil jurisdiction. In the exercise of that jurisdiction, the High Court stands in most respects in the place of the late Supreme Court. The law which it applies to mortgages may be said generally to be the English law,—and this, without reference to the nature of the mortgage, whether it is in the form of an English mortgage, or in one of the forms in common use in the mofussil. But it is only speaking *generally* that the English law can be said to be applicable.

In the Supreme Court it was held that when the evidence showed that the contract was made *with special reference to the mofussil law*, the Court must decide the case according to that law, although it would not be bound to follow the mofussil Courts as to matters of *mere procedure*. In

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(a) More especially in the High Court of Calcutta.

(b) Under this Act the same law is applicable in all Courts, subject, however, in the case of mortgages to any rules consistent with the Act which the High Court may make for carrying out in itself and in the Courts of Civil Judicature subject to its superintendence the provisions contained in the Act (see sec. 104.)

delivering judgment in the case of *Skinner v. Sandyal* (c) the Chief Justice (d) said: "A preliminary question arises, viz., by what law should the cause be decided? It is a case of contract, and the defendants are Hindns, and by the terms of the statute the contract should be governed by their law. But in truth the law of mortgages in the mofussil now depends on the regulations, and not simply on the Mahomedan or Hindu law, and that statute consequently furnishes no rule. Had the evidence shown that these contracting parties had contracted with reference to a different law than the law of the *forum*, then, as we conceive that it would be perfectly competent for them to do so, the Court must have decided the case by the law of their adoption. There is certainly considerable difference between the law of mortgages as administered in the Company's Courts and the law of mortgages as applied in this Court. Still the fundamental principle under both systems, is that the mortgage security is to be a security for principal, interest, and costs only; and in whatever form it be taken, so far as it is a mortgage security, it will not be allowed to have any other effect. The law as to land tenure in India, and the effects of the revenue system there on the rights of proprietors or of persons interested in land, are very different from the law of real property in England, and the effects of any fiscal laws upon land; and may well justify the adoption of securities differing from those which are commonly adopted under the English law. And when the forms of securities which are adopted in mofussil mortgages, and the estates which are created there to give effect to such securities, obtain in contracts between British subjects, or between British subjects and natives, the adoption

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(c) Supreme Court, 4th August 1855. See also *Doe d. Sibchunder Doss v. Sibkissen Bonnerjee*, 1 Boulnois 70.

(d) *Sir Lawrence Peel*.

of them may be evidence that the parties meant, so far at least, to contract on the basis of the local law. The English law has nothing opposed to such an adoption and incorporation into itself, of a local law not forming part of it."

In a case in which a second mortgagee sought to redeem the first mortgagee, all the parties being Hindus, it was unsuccessfully contended that the mofussil law governed the case, and that according to that law as it had been recently laid down, the first mortgagee having a mortgage in the nature of a conditional sale, could not be redeemed against his will by a second mortgagee (e). The lands were situated in the mofussil, and the plaintiff, the second mortgagee, held a simple mortgage. The defendants were first mortgagees under a deed in the English form: and they had obtained a decree for foreclosure in the Supreme Court, but had not made the plaintiff, as second mortgagee, a party in their suit. The defendants having been put in possession of the property under their foreclosure decree, the plaintiff instituted a suit to redeem in the Supreme Court. Neither that suit nor the earlier foreclosure suit would lie now in the High Court, no part of the lands mortgaged being situate within the local limits of the original jurisdiction (f). But under the law applicable to the Supreme Court, there was a personal jurisdiction over the parties which enabled the Court to entertain the suits (g). The Court said (h): "The first question is whether the

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(e) *Bholanath Coondoo Chowdry v. Unodapersad Roy*, 1 Boulnois, 97. See also *Hurronath Chatterjea v. Sreekishen Singh*, S. D. A., 1858, p. 656; and see *ante* pp. 331 *et seq.*

(f) See *post* p. 585.

(g) Compare the recent decision by the Madras High Court in *Jamuna Bhair v. Sadagopa*, I.L.R. 7 Mad. 56.

(h) *Bholanath Coondoo Chowdry v. Unodapersad Roy*, 1 Boulnois, 97 (*cf.* p. 100.)

plaintiffs, independently of mofussil law, have established a right to redeem. Upon the facts both the securities of the defendants are anterior to the only security on which the plaintiffs can rely; they are so both by registration and by reason of the plaintiffs' previous securities being all merged in the last. The plaintiffs can only redeem on the footing of their last security, and on redeeming both the mortgages on which the defendants claim, and on which they have obtained decrees against the mortgagor. The next question is as to the nature of the last of the plaintiffs' securities. It is a security which clearly, according to the law of this Court, is a pledge of the land, and entitles the pledgee to come not as on a mere money demand, but against the land, to get an account, and to claim a foreclosure or sale, on default of payment of the mortgage debt. It is that sort of pledge which entitles the pledgee to redeem a prior pledge in order to give effect to his own security, supposing mofussil law not to be different from ours, or not to be applicable. But it has been contended that we ought to apply mofussil law, and that according to that law no interest at all passes to the subsequent mortgagee, or at least that he has no *locus standi* to re-open a foreclosure. The law that is invoked, does not appear to us to be like a *real* law, but rather to be part either of the law of contract or of legal procedure. That there may be rights acquired in land by a pledge or mortgage of it, is common to both laws. The defendants have taken, on land in the mofussil, a mortgage in the English form; the inference is therefore strong that they intended to contract with reference to English law, and to enforce their rights according to that law (i). And not only is the mortgage in the English form, but the deed contains a

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(i) It is on this principle that it has been held in Bombay that when a mortgage is in the English form a power of sale is valid, even

jurisdiction clause. Then all the argument that the *bye-bil-wufa* or mortgage by conditional sale, according to mofussil law, gives no remedies against the mortgagor personally, but only against the land, falls to the ground when we consider that the law of this Court, and the terms of the defendants' mortgage deed, give the mortgagees a right against both the land and the person. The defendants have contracted not only for such a security as a *bye-bil-wufa* affords, but for all the rights given by an English mortgage. Upon this it is said that the mofussil Courts have treated English mortgages in the same way as *bye-bil-wufas*. If this be the case, the Courts may possibly be right to some extent, for though an English mortgage deed is a money bond, it is also a security of another kind, and is a sort of deed of conditional sale: and so far the mofussil Courts may legitimately have considered Regulation XVII of 1806 to apply to it. It has also been argued, that the mofussil Courts consider a decree of foreclosure of this Court as entitled to the same effect as a decree of foreclosure in a mofussil Court under the Regulations. They are right in this also, with one limitation—that is to say, if they take the decree of foreclosure of the Supreme Court to be binding on all parties to the suit in which the decree was made, and if they have not given the decree a wider operation than this Court does. A decree of foreclosure has been obtained in this Court by the defendants, who, instead of following the ordinary procedure of the Court, omitted to make the plaintiffs parties to the suit. We cannot help the operation of this. When it is questioned before us, we must regard the decree of foreclosure

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though the lands are situated in the mofussil. See *Pitamber Narayendas v. Vanmali Shamji*, I.L.R. 2 Bom, 1; and *Jagjivan Nanabhai v. Shridhar Balkrishna Nagarkar*, I.L.R. 2 Bom. 252. See also *ante*, pp. 145—147.

wholly independently of what has been decreed in the mofussil Courts. The question has been raised whether we could contravene any mofussil law or refuse to apply any *lex loci*. But do we contravene any such law? It cannot be said that there is any substantive law on the subject. There is no law which says the mortgagor may not deal with the interest that remains in him. It is indeed admitted that he may sell his interest out and out to a purchaser, and that such purchaser stands in his shoes: this being the case, how can it be said that he shall not conditionally dispose of his interest, when there is no law that forbids his doing so? There is nothing that makes a second mortgage a prohibited security; and if the principle of assignment is once recognized, it is illogical not to recognize a conditional assignment also. Assuming the law to be exactly what it has been argued to be, it only shows that, according to the law of the mofussil under Regulation XVII of 1806, a mortgagee can make his interest absolute against subsequent incumbrancers without going through certain forms against them which in this Court are essential: and this is a simple matter of procedure. It is treating this contract in the same way as a Court of law treats the assignment of a *chose in action*. The Regulation may have been framed in contemplation only of the agreement between the parties to the contract, or it may have been framed on the balance of convenience, and it may therefore have been laid down by the Courts that when the mortgagor retained any interest, he alone should receive notice, and that it should be left to the honesty of that person to give notice to other incumbrancers. But this does not alter the substantive law: it only makes the incumbrancers less secure, and constitutes no *lex loci rei sitæ* such as we are bound to adopt. This Court is to administer Hindu law when the parties are Hindus; and if the law as to

mortgages among the Hindus were *res integra*, it might be said that we went far in importing the equitable doctrines of the English law into the question; but now that law is established. In 1806 the Legislature of this country applied the general equitable law of foreclosure to these mortgage agreements; but it gave a foreclosure somewhat different from that of our Courts. It cannot be said that because the parties to this cause happen to be residing in the mofussil, this Court is to depart from its general rules. It has been argued that the plaintiffs have already obtained in the mofussil Court, all that by the mofussil law they could get, and all that they expected to get when they entered into the contract, and that they ought not to be allowed to put themselves, by coming into this Court, in a better position than if the defendants had brought their foreclosure suit in the mofussil instead of here. But the defendants chose to come here and take a decree for foreclosure. Their position would, no doubt, have been different under a mofussil decree: but the defendants having chosen to come here, the plaintiffs (having a right to redeem) say 'we were not made parties, the right of redemption is still subsisting—give effect to it.' Possibly if the defendants had adopted some other mode of proceeding, they might have had other rights than those they now possess, but this consideration cannot control the rules of this Court. There is in reality no hardship on the defendants, for this is no mine sprung upon them after foreclosure. The defendants might have taken a decree in a mofussil Court if they had pleased: but they did not do so, though they knew of the existence of the plaintiffs' claims. Possibly the plaintiffs may be blamed for having slept on their rights for so long: but what can be said for the defendants not having made the plaintiffs parties to their foreclosure suit, except that they chose to rest on their view that mofussil law was applicable to the



case? They chose to do what the Court considers wrong; their opinion was a speculation which the Court does not support. There must be a decree for redemption."

In another case (*j*) the mortgagee, taking advantage of the mortgagor's being personally subject to the jurisdiction of the Supreme Court (which gave that Court jurisdiction even although the land, the subject of suit, was situate in the mofussil), brought an action of ejectment against the mortgagor, to recover possession of land in the mofussil. He claimed under a mortgage by way of conditional sale. On the 11th of August 1858, which was after the date on which the mortgage debt was by the terms of the contract repayable, the defendant, the mortgagor, deposited the amount of the debt in the District Court: and on the 17th of September notice of this deposit was given to the mortgagee. The plaint was filed on the 13th of August 1858. A verdict was given for the defendant, but on an application for a new trial subsequently made, it was contended that a verdict ought to be entered for the mortgagee on the ground that, notwithstanding Ben. Regulations I of 1798 and XVII of 1806, he was entitled to bring an action of ejectment in the Supreme Court. For the mortgagor it was argued that the deposit of the mortgage money in the mofussil Court by him, was a sufficient redemption of the mortgage under the provisions of Ben. Regulations I of 1798 and XVII of 1806; and further that if it was not, the plaintiff, the mortgagee, was bound to proceed in the mofussil Court to obtain a foreclosure. The Court (*k*) held that the deposit of the mortgage money by the mortgagor in the District Court, after the mortgage had become absolute, but before the institution of the proceedings in the mofussil for foreclosure, was not within the Regulation, and was therefore

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(*j*) *Doe d. Chuttoo Sick Jemadar v. Subbessur Sein*, 2 Boulnois 151.

(*k*) *Sir C. Jackson and Sir M. Wells, JJ.*

ineffectual to redeem the mortgaged property. Upon the second question,—whether the plaintiff had any right to bring an action of ejectment in the Supreme Court without having proceeded to foreclose in the Court within the jurisdiction of which the property was situate,—it was held that although the accident of the defendant being an inhabitant of Calcutta gave jurisdiction, still the Court was bound to administer the *lex loci rei sitae*: that Bengal Regulation XVII of 1806 established a form for foreclosure and was a measure framed for the protection of the mortgagor, conferring on him positive rights which he had not before, with reference to which the mortgagee must be supposed to have contracted and which it would be unjust to take away from the mortgagor: and that therefore the mortgagee could not get possession without first proceeding to foreclose in the mofussil Court, so as to give the mortgagor the opportunity of redeeming within the year of grace, which he was entitled to do under the Regulation.

But cases such as these last referred to could not occur now, even apart from the provisions of the Transfer of Property Act, 1882, owing to the restricted jurisdiction which the High Court as a Court of original jurisdiction exercises in suits relating to land. Such suits are not cognizable in the High Court merely by reason of the defendant being personally subject to the jurisdiction. By sec. 12 of the Letters Patent of 1865 the Court (1) in the exercise of its ordinary original civil jurisdiction can entertain “suits for land or other immoveable property” only if such land or property shall be situated, either wholly or in part, within the local limits of the ordinary original jurisdiction of the High Court. If the

(1) *i.e.*, the High Court of Calcutta, Madras or Bombay, as the case may be. Letters Patent were granted in similar terms to each of these Courts in 1865. The High Court, N. W. P., to which Letters Patent were granted in 1866, does not possess ordinary original civil jurisdiction.

lands lie only partly within the local limits of the High Court's jurisdiction, the leave of the Court must be obtained before the suit is instituted (*m*).

The term "in part" in sec. 12 of the Letters Patent has been construed as not limited to part of the same block or parcel of land, but as (in a wider sense) comprising a part of lands consisting possibly of many blocks or parcels, but held under the same title. Thus where there was a mortgage—or rather several mortgages, all of them together forming one connected transaction—in the English form, of lands in the mofussil and also of land in Calcutta, leave was given to sue on the original side of the High Court for an account and foreclosure: and it was held that the Court in the exercise of its ordinary original civil jurisdiction had power to make a decree embracing the whole property.

This was in the case of the *Bank of Hindustan, China & Japan v. Nundolall Sen* (*n*). The facts were very complicated. The mortgagee had already foreclosed mortgages which he had of some of the mofussil properties: and as regards other lands, they had been actually sold under a money-decree which the mortgagee had obtained. The mortgagee, to whom a large sum remained due, then filed his suit in the High Court on its original side, praying generally for an adjustment of the account and for foreclosure as regards the properties not already dealt with. In delivering judgment the Court said (*o*): "Leave to sue in this Court was obtained when the plaint was filed, and therefore under the peculiar state of facts shown by the plaint, the suit will lie, though some of the properties which are the subject of it are situated in the mofussil. But the suit being here, it is impossible that, in foreclosing the mortgages of the lands which lie out of

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(*m*) *Shaikh Abdool Hamed v. Promothonauth Bose*, 1 Ind. Jur. 182.

(*n*) 11 B.L.R. 301.

(*o*) *Ibid*, cf. p. 308:—Affirmed in appeal. *Ibid*, p. 311.

Calcutta, I should follow the procedure prescribed by the Regulations for the foreclosure of mofussil mortgages. This Court has no means of carrying out a foreclosure under that procedure. At the same time, on the principles indicated in the case of *Doe d. Chutto Sick Jemadar v. Subbessur Sein* (p), I ought to see that the defendant is not, by reason of the suit being brought in this Court, deprived of any substantial advantage which he would have had if the suit had been instituted in a Court in the mofussil. For example, as the defendant, if sued in the mofussil, would have had what is called his year of grace within which he might redeem, so here he should have a full corresponding year allowed him before making the foreclosure absolute. The parties having contracted in the English form, there is no hardship or injustice to the defendant in dealing with the case in the manner in which I propose to treat it. It is true that to a certain extent, mortgages of lands in the mofussil, drawn up in the English language and in the form of an ordinary English mortgage, have been treated as common *bye-bil-wufas*, or conditional sales. But that has been merely with reference to the one question of the procedure to be gone through in order to obtain foreclosure. In an ordinary Bengali *bye-bil-wufa* it appears on the face of the document itself that the parties intend that, if the mortgagor does not pay the money due, the conditional sale shall become absolute, and the property shall remain finally with the mortgagee in lieu of the debt. Where such intention is apparent, the mofussil Courts have held, and with good reason, that the creditor must look to the land only, and has no remedy against the other property or the person of the mortgagor. But the intention and contract are wholly different in a mortgage in the common English form, where personal and general liability is always contracted for, in addition to the security afforded by the

mortgage of the land. It seems to me there is nothing in the argument that, because some of the earlier mortgages have been foreclosed by reason of the non-payment of the same debt, therefore the debt is now to be deemed to be satisfied. Whether it is so or not, according to English law, in an ordinary and simple case where there is but one debt and one security, to apply such a rule, in an exceptional case like the present, would be wholly inequitable and wrong as being contrary to the express intention of the parties as testified in the several deeds executed by them. The Regulations which lay down the law on the subject of mortgages to be applied in the Courts in the mofussil never contemplated a case like this now before me; and they make no provision for such a case. No mofussil Court in truth has any machinery with which to deal properly with such a matter as this. The English law does not indicate that the plaintiffs' right to recover their money in one way or other would be barred by the foreclosures which have been already obtained; although no doubt the institution of this suit would re-open the foreclosures, and let the defendant in to redeem. I quite think that, if the defendant now chooses to pay off the debt, the foreclosures should be set aside: and doubtless the plaintiffs will be well pleased to be paid off on such terms."

The course adopted in this case has been followed in several later instances.

Applying the same principle, it may be doubted whether a suit similar in character to that of *Doe d. Chutto Sick Jemadar v. Subbessur Sein* (g) if now instituted with the leave of the Court, part of the land being within the local limits of the original jurisdiction, would be dismissed as that suit was. For supposing a suit in the nature of an action of ejectment were brought by a mortgagee in respect of lands

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(g) 2 Boulnois 151. See *ante* p. 584.

situated partly within the local limits of the original jurisdiction, the Court might deal with it as with the case of the *Bank of Hindustan, China & Japan v. Nundololl Sen* (r), and give a decree substantially preserving to the mortgagor all the rights of redemption, &c., which he would have had in a foreclosure suit instituted in a mofussil Court.

The High Court cannot exercise ordinary original jurisdiction with respect to lands not wholly or in part within its local limits, even though the lands are in the possession of the Court Receiver (s). A suit for foreclosure is a suit for land (t) : as also is a suit for redemption (u).

Although the Court has no jurisdiction over land or other immoveable property not within the local limits of the jurisdiction, and cannot adjudicate as to the right and title thereto, yet when one who holds such land is *personally* subject to the jurisdiction, the Court can declare whether or not he holds it subject to a trust (v).

But this is only where there is no dispute as to the legal title to the land. If the title is contested and has to be determined before any declaration of trust can be made, a suit founded on the mere personal jurisdiction over the alleged trustee will not lie. This was decided in the case of the *Delhi and London Bank v. Wordie* (w). There the plaintiff stated that lands in the mofussil had been conveyed

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(r) 11 B. L. R. 301.

(s) *Denonath Sreemony v. Hogg*, 1 Hyde 141.

(t) *Bibee Jaun v. Meerza Mahomed Hadee*, 1 Ind. Jur. 40. See also *Blaquiere v. Ramdhone Doss*, Bourke (o.c.j.) 319.

(u) *Sreemutty Lalmonney Dossee v. Juddoonath Shaw*, 1 Ind. Jur. 319.

(v) *Bagram v. Moses*, 1 Hyde 284.

(w) I.L.R., 1 Calc. 249. See also *The East Indian Railway Company v. The Bengal Coal Company*, I.L.R. 1 Calc. 95; *Kellie v. Fraser*, I.L.R. 2 Calc. 445; *Jairam Narayan Raje v. Atmaram Narayan Raje*, I.L.R. 4 Bom. 482.

by A and B to C and D, in trust to sell and divide the proceeds rateably among the creditors of A and B. The plaintiffs were creditors and prayed for a decree declaring the trust in C and D (who were personally subject to the jurisdiction) and directing them to sell, &c. The answer was that C and D had in fact no good title to the lands, inasmuch as B repudiated the alleged conveyance in his name to C and D. It was held that the suit was neither more nor less than a suit for land, one of the main points which the Court was asked to decide being the title of the alleged trustees C and D to the share of B. In so deciding, the Court said that the case before it was distinguishable from that of *Bagram v. Moses* (x), which is not overruled.

In a more recent case the facts were that, in consideration of a loan of Rs. 4,000 the defendant had agreed to execute a mortgage of certain land beyond the jurisdiction of the High Court to the plaintiff, and to produce his title-deeds, and make a good title. In the agreement the plaintiff was described as "of Durmahatta, in the town of Calcutta, merchant," and the defendant as "of Panchthopy in Zilla Beerbhoom, at present of Coomertooly in Calcutta." The plaintiff sued for specific performance of the agreement to execute the mortgage, and in the alternative for the return of the Rs. 4,000. It was held by *Pontifex, J.*, that so far as the suit was one for specific performance, the Court had no jurisdiction; but that, as the plaintiff was described as of Calcutta, and did in fact carry on business there, and the money paid under the agreement was paid in Calcutta, the defendant would be entitled to redeem by paying the mortgage money in Calcutta, and therefore that the Court could give the plaintiff a money-decree (y).

When a case is removed from a mofussil Court and tried by the High Court in the exercise of its extraordinary

(x) 1 Hyde, 284.

(y) *Sreenath Roy v. Cally Doss Ghose*, I.L.R. 5 Calc. 82.



original civil jurisdiction, the law to be applied to the case is that which would have been applied to it by any local Court having jurisdiction therein (z). Thus when a suit for redemption, instituted in Dacca, was tried by the High Court in the exercise of its extraordinary original jurisdiction, it was decided according to the law which would have been applied if it had been tried in the Dacca Court, from which it was removed (a).

There was at one time some uncertainty in the Supreme Court as to the relief to which a mortgagee of lands, whether within or without the local limits of Calcutta, is entitled on a mortgage not in the English form, but in one of the forms in common use in the mofussil. The uncertainty was as to whether the decree ought to be for sale or for foreclosure. For a considerable period the decree in all cases was for a sale (b). But latterly the practice was to follow the intention of the parties, as evidenced by their contract; or if the intention could not be gathered from the terms of the agreement, to allow the plaintiff to make his election.

This rule, and the reasons on which it is founded, are laid down in the following judgment of the Court (c):—"Three claims were brought before the Court, in each of which the plaintiff sought an order of foreclosure. Two of these were upon Bengali khuts; the third upon an equitable mortgage constituted by deposit of title-deeds and an English memorandum in writing declaring the purpose of the

(z) Letters Patent of 1865, sec. 20, granted to the High Courts of Calcutta, Madras and Bombay respectively, and compare sec. 13 of the Letters Patent of 1866 granted to the High Court, N. W. P.

(a) *Doucett v. Wise*, 2 Ind. Jur. 280 (cf. p. 291.)

(b) *Collydoss Gungopadhia v. Sibchunder Mullick*, Morton 111.

(c) *Ramnarain Bose v. Ramcunny Paul*, and *Pertaubchunder Paul v. Ashlam Holdar*, 24th December 1851.

deposit (d). The Court took time to consider whether the relief to be granted on these securities in the event of the non-payment of the sums found to be due thereon respectively, should be a sale or foreclosure. It appears that this Court has ordinarily given effect to Bengali securities of this nature by sale. There seems, however, to be no reason why, if the Bengali instrument, as many mortgage khuts or *bye-bil-wufas* do, actually import a conditional sale, intended to become absolute if the money be not paid by a certain time, this Court should not do what the Courts of the East India Company do in like cases, and give effect to the security by a decree of foreclosure. The practice of this Court was, we believe, adopted in supposed conformity with the practice of the Court of Chancery in cases of equitable mortgages. The course of practice in England, however, as to the nature of the relief to be granted on equitable mortgages, has not been uniform. In some of the earlier cases the decree was for foreclosure, with a direction for an absolute conveyance by the mortgagor. There followed a period in which the ordinary decree was for a sale; and in one or two cases the sale was directed to be immediate. In *Parker v. Housefield* (e), however, Lord Cottenham when at the Rolls decided that whether the relief granted was sale, or whether it was foreclosure, the period of six months given for redemption by a decree on a legal mortgage, must be equally given by a decree on an equitable mortgage; and in most of the modern cases (f), the Court has reverted to the earlier form of decree, and directed a foreclosure and absolute conveyance. The form

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(d) As to an equitable mortgage by deposit of title-deeds, see *ante* pp. 111-113.

(e) 2 Mylne and Keen, 419.

(f) See amongst others *Ball v. Harris*, 8 Simons, 485; S.C. on Appeal, 4 Mylne and Craig, 264; *Tylee v. Webb*, 6 Beavan, 552; *Holmes v. Turner*, 7 Hare, 367 (note).

of order to be made on a claim founded on an equitable mortgage, as issued by the Court of Chancery and adopted by this Court, also shows that foreclosure is now considered in general cases the proper mode of relief. There are, however, exceptional cases: and such decisions as *Sampson v. Pattison* (g) and *Lister v. Turner* (h) show, that if the security afford evidence that a sale and not a foreclosure was in the contemplation of the contracting parties, the relief granted will be the former. In the case of *Ramnaraïn Bose v. Ramcunny Paul*, we think there is such evidence. The parties have expressly stipulated that in the event of the non-payment of the money the property shall be sold. In this case therefore we think the decree should be for sale. In *Pertaubchunder Paulit v. Ashlam Holdar* the security says nothing about a sale; it does not clearly define what is to be done in default of payment, but it is termed a khut mortgaging lands, and there seems to us to be no reason why, if the plaintiff prefer it, he should not have the usual order of foreclosure. In the other case the order may be the usual order of foreclosure on an equitable mortgage by deposit."

Whether the mortgage was by conditional sale or not, the mortgagee could in the Supreme Court recover the money advanced by him, with interest, on default being made by the mortgagor in payment at the appointed time. At first the Court seems to have entertained doubts on this point, and in one or two instances, it was held that when the terms of the contract implied that the mortgagee was to look to the land alone for payment, he could not recover the money debt (i). But it has long been established, that

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(g) 1 Hare, 553.

(h) 5 Hare, 281.

(i) *Radhakurn Seat v. Panchanund Sealmony*, Morton 233; *Ruggonauth Shaw v. Ramdun Deb Surmono*, Morton 234 (note [b]).

an action for money lent will lie on the expiration of the time limited, the mortgage being treated merely as evidence of the original loan (*j*).

Where the plaintiff, after having obtained a decree in the Supreme Court, was obliged to have recourse to a mofussil Court in order to have it carried out, the latter was bound to accept and to respect the subsisting decree; the question which had been decided could be re-opened only in the Court which decided it (*k*).

But decrees of the Supreme Court could not be enforced in the mofussil Courts against any person, except the parties to the original suit, or their representatives. Therefore when the mortgagee sued the mortgagor alone in the Supreme Court, and got a decree for foreclosure, and afterwards brought a suit for possession, founded on this decree, against a third party whom he found in occupation of the lands, that party having purchased the mortgagor's rights before the institution of the suit in the Supreme Court, it was held that, as the defendant had not been a party to the original suit, the decree formed no ground for a claim against him in the mofussil Court (*l*).

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(*j*) *Tilluckram Puckrassy v. Choiton Churn Nant*, Morton, 230; *Sopleram Day v. Punchanund Mitter*, Morton 232; and see Morton, p. 233 [note b], and *Bulleram Mitter v. Ramchunder Doss Paulit*, Morton 239.

(*k*) *Bhuwanee Churn Mitter v. Jykishen Mitter*, S.D.A., 1847, p. 354; *Sutherland v. Campbell*, S.D.A., 1853, p. 859; *Issur Chunder Ghose v. Neelkummul Paul*, S.D.A., 1850, p. 458; *Beebee Takee Shirral v. David Mullick Teridon Beglar*, S.D.A., 1856, p. 323.

(*l*) *Dabee Koomar Bose v. Roy Bykuntanath Chowdree*, S.D.A., 1853, p. 210. See also *Sutherland v. Campbell*, S.D.A., 1853, p. 859; *Issur Chunder Ghose v. Neelkummul Paul Chowdhree*, S.D.A., 1850, p. 458; *Abadie v. Maxwell*, S.D.A. N.W.P., 1853, p. 316. See also *Bholanath Coondoo Chowdry v. Sree Kissen Singh*, 1 Boulnois 97, and *ante* pp. 579-584.

A decree by the Supreme Court for sale of mortgaged lands situate in the mofussil, had no effect whatever *in rem*. It was in substance merely a decree that the parties in the suit should concur in conveying the property to a purchaser. And such a decree for sale had no operation on the title of persons in the mofussil who were not parties to the suit (*m*).

A mortgagee having obtained a decree of foreclosure in the Supreme Court, sued on it in the mofussil for possession, bringing his suit against the person whom he found in occupation. The defendant pleaded that he had bought the land from the mortgagor, subsequent to the date of the plaintiff's mortgage, but more than twelve years before the institution of the foreclosure suit. The Court ruled that the suit was barred by lapse of time, the defendant having been more than twelve years in undisturbed possession (*n*).

Act XIV of 1859 declared (*o*) the period of limitation in suits for the recovery of immoveable property or of any interest in immoveable property to be twelve years from the time the cause of action arose. But it further (*p*) provided that "in suits in the Courts established by Royal Charter by a mortgagee to recover from the mortgagor the possession of the immoveable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt." The

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(*m*) *Anundo Moyee Dasse v. Dhonendro Chunder Mookerjee*, 14 Moore's I. A. 101 (*cf.* p. 109) ; S.C. 8 B. L. R. 122 (*cf.* p. 125.)

(*n*) *Dabee Koomar Bose v. Roy Bykuntnath Chowdree*, S.A.D., 1853, p. 210. So also *Brojonath Koondoo Chowdry v. Khelut Chunder Ghose*, 14 Moore's I. A. 144 ; S.C. 8 B.L.R. 104 ; and *Punchanun Bose v. Roy Bykuntnath Chowdree*, S.D.A., 1853, p. 546.

(*o*) Sec. 1, cl. 12.

(*p*) Sec 6.

effect of these clauses when read together was to give a mortgagee—suing his mortgagor in the late Supreme Court or in the High Court on its original side, for possession of immoveable mortgaged property,—twelve years from the latest payment on account of the mortgage debt, within which to bring his suit.

Discussing these provisions in a case in which the right under the mortgage deed was to obtain possession of the land when default was made, and the cause of action accrued then,—the Privy Council remark (with reference to the exception as to suits in Courts established by Royal Charter) that where there is an express exception so limited to one especial case of mortgage, it might plausibly be argued that it cannot be extended to any other case, not even to that of the original mortgagor himself continuing in possession and paying interest to the mortgagee. Their Lordships however (without deciding the point) continue: "It may, however, have been deemed necessary to introduce the exception stated above, in order to put mortgages in the English form, when put in suit in the Supreme Court which was generally governed by English law, upon the same footing as that in which English mortgages are under the existing statutes of limitation: and their Lordships dealing with suits upon mortgages in the native Courts of India, might, in the simple case of a mortgagee and his mortgagor being permitted to remain in possession so long as he paid interest, have found ground for considering that there was a permissive possession, and that a new cause of action and right of entry accrued when that permission ceased" (q).

By the later Limitation Acts of 1871 and 1877 (r) twelve

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(q) *Brojonath Koondoo Chowdry v. Khelut Chunder Ghose*, 14 Moore's I. A. 144 (cf. p. 150); S.C. 8 B.L.R. 104 (cf. p. 109).

(r) Art. 135 of Sch. II of Acts IX of 1871 and XV of 1877.

years, beginning to run in the case of the former Act, when the mortgagee is first entitled to possession, and in the case of the latter Act, when the mortgagor's right to possession determines, is still the period of limitation in suits instituted in a Court not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged. But in a similar suit before a Court established by Royal Charter, *i.e.*, a High Court in the exercise of its ordinary original civil jurisdiction, the period of limitation is (*s*) in the case of the former Act sixty, and in the case of the latter Act thirty years,—and the years begin to run when any part of the principal or interest was last paid on account of the mortgage debt. Where mortgaged land lies in the mofussil, and the High Court can entertain a suit relating to it because some part of the property comprised in the mortgage is situate within the local limits of the High Court's ordinary original civil jurisdiction, it would seem to be a doubtful question whether the mortgagee should not under these Acts get the benefit of the sixty years' or thirty years' rule, as the case may be, even as regards the land in the mofussil. The Act of 1877, however, contains a new provision (*t*) prescribing sixty years from the time when the money secured by a mortgage becomes due as the period of limitation for a suit in any Court by a mortgagee for foreclosure or sale. So the question of the application of Art. 146 of that Act to land in the mofussil is now of less importance.

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(*s*) Arts. 149 and 146 of Sch. II of Acts IX of 1871 and XV of 1877, respectively.

(*t*) Art. 147 of Sch. II.



## APPENDIX. (a)

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### I.—PURE USUFRUCTUARY MORTGAGE. (b).

I WRITE this instrument of mortgage of talook Barnagore, in pergunnah Meerbhoom, in the District of Nuddea, the net annual profit of which, after deducting the sum of Rs. 400 for the Government revenue, is Rs. 500. In consideration of my mortgaging to you the aforesaid talook, I borrow from you the sum of Rs. 1,200, re-payable with interest at the rate of 12 per cent. per annum. I will immediately put you in possession of the said talook, and you will collect the rents, &c., thereof: after paying the Government revenue from the said collections, you will apply the remainder to the payment of interest that will accrue due to you on the said sum, and in case there shall be any surplus after such payment of interest as aforesaid, such surplus shall be taken by you in part payment of the principal. You will so remain in possession of the aforesaid talook till the whole amount of the loan, together with interest at the rate aforesaid, is liquidated. Dated, &c.

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### II.—SIMPLE MORTGAGE.

I WRITE this instrument of mortgage of land situated in Aheeritola Street, in Shootanooty, which I purchased in the year 1820, that is to say, 17 beeghas 5 chittacks of land, bounded on the North by the house of Sibchunder Ghose, on the South by a garden belonging to Ramlohl Sen, on the East by the house of Rammohun Dass, and on the West by the house of Sreekishen Bose. In consideration of my mortgaging to you the aforesaid land, I borrow from you the sum of Rs. 1,600 which is to be repaid on the 16th March 1880 with interest at the rate of 12 per cent. per annum. In default of my

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(a) These forms though reprinted from former editions of this work, are not intended as precedents to be followed in the preparation of similar mortgages now.

(b) The first three precedents are nearly literal translations [except as to dates] of mortgage bonds on which advances were actually made, and which were put in suit many years ago. Such documents, if prepared now, must contain the details required by the Registration Act, &c.

paying the abovementioned sum with interest, within the limited time, you will cause the aforesaid land to be sold and pay yourself by the proceeds thereof. I deposit with you the title deeds of the land, which shall be returned to me on the re-payment of the loan with interest. Dated, &c.

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### III.—MORTGAGE BY CONDITIONAL SALE, KUT-KUBALA, OR BYE-BIL-WUFA.

I WRITE this instrument of mortgage of 6 beegahs 2 chittaks of ancestral rent-free land, in mouzah Borocota, in the District of Hooghly, which has for a long time been my property. The said land is bounded on the North by the house of Sibchunder Ghose ; on the South by the house of Shamchunder Mullick ; on the West by a pond belonging to Madhubchunder Paul ; on the East by a piece of land belonging to Mahadeb Sircar. In consideration of my mortgaging the aforesaid land to you, I borrow from you the sum of Rs. 175, which is to be repaid at the end of one year from this date, with interest at the rate of 12 per cent. per annum. In default of my paying the above mentioned sum with interest, within the limited time, I agree to relinquish my interest in the aforesaid land and to put you in possession thereof as rightful owner and proprietor. I deposit with you the title deeds of the aforesaid land which shall be returned to me on the re-payment of the loan with interest. Dated, &c.

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### IV.—ENGLISH MORTGAGE IN FEE, WITH POWER OF SALE.

This indenture, made the       day of       between A. B., of &c. (mortgagor) of the one part, and C. D., of &c., (mortgagee) of the other part, witnesseth, that, in consideration of the sum of £       this day paid to the said A. B., by the said C. D., (the receipt whereof the said A. B., doth hereby acknowledge) he, the said A. B., doth hereby, for himself, his heirs, executors and administrators, covenant with the said C. D., his executors and administrators, that the said A. B., his heirs, executors, or administrators, will pay to the said C. D., his executors, administrators, or assigns, the sum of £       (the principal), with interest for the same in the meantime at the rate

of £      per cent. per annum on the      day of      next (c), without any deduction. And this Indenture (d). also Witnesseth that, for the consideration aforesaid, the said A. B. doth hereby grant and release unto the said C. D., his heirs and assigns, all those lands, tenements, messuages and hereditaments, situate in the Parish of      , in the county of      , delineated in the plan in the margin of these presents and specified in the Schedule hereunder written (e) together with all commons, ways, lights, waters, water-courses, rights, privileges, easements, advantages and appurtenances whatsoever to the said hereditaments or any part thereof appertaining, or with the same or any part thereof held, used, or enjoyed, or reputed as part thereof, or appurtenant thereto ; and all the estate and interest of the said A. B., in the said premises : To hold the said premises unto and to the use of the said C. D., his heirs and assigns. Provided always, that, if the said A. B., his heirs, executors, administrators or assigns, shall pay unto the said C. D., his executors, administrators or assigns, the said sum of £      (the principal), together with interest for the same in the meantime at the rate of £      per cent. per annum, on the said      day of      next without any deduction, then the said C. D., his heirs, or assigns, will, at any time thereafter, upon the request and at the cost of the said A. B., his heirs, executors, administrators, or assigns, re-convey the said premises unto the said A. B., his heirs and assigns, or as he or they shall direct, free from incumbrances by the said C. D., his heirs, executors, or assigns. And it is hereby declared that the said C. D., his executors, administrators, or assigns, may at any time or times after the said      day of      next (f) without any further consent on the part of the said A. B., his heirs, or assigns, sell the said premises, or any part thereof, either together or in parcels, and either by public auction or private contract, and may buy in or rescind any contract for sale, and re-sell, without being responsible for loss occasioned

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(c) Generally six Calendar months from the date of the mortgage.

(d) When the property mortgaged was situated in India, the words "which is executed in pursuance of, and intended to take effect under Act IX of 1842 of the Legislative Council of India," had formerly to be here inserted. Act IX of 1842 has, however, been repealed by the Transfer of Property Act, 1882.

(e) See the provisions of the Indian Registration Act, 1877, s. 21, for the description of parcels.

(f) The day for payment of the principal sum.

thereby ; and may execute and do all such assurances and acts for effectuating any such sale as the said C. D., his executors, administrators, or assigns, shall think fit : And that upon a sale by any person or persons who may not be seized of the legal estate, the person in whom the legal estate shall be vested shall execute and do all such assurances and acts for carrying the sale into effect, as the person or persons by whom the sale shall be made shall direct : Provided nevertheless, that the said C. D., his executors, administrators, or assigns shall not execute the power of sale hereinbefore contained, until he or they shall have given to the said A. B., his heirs, executors, administrators, or assigns, or left on the said premises, a notice in writing to pay off the monies for the time being owing on the security of these presents, and default shall have been made in such payment for six calendar months after giving or leaving such notice : Provided, also, that upon any sale purporting to be made in pursuance of the aforesaid power, no purchaser shall be bound to inquire whether the case mentioned in the clause lastly hereinbefore contained has happened, nor whether any money remains upon the security of these presents, nor as to the propriety or regularity of such sale ; and notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, as regards the purchaser or purchasers, be deemed to be within the aforesaid power, and be valid accordingly. And it is hereby declared that the receipt of the said C. D., his executors, administrators, or assigns, for the purchase monies of the premises sold, or any part thereof, shall effectually discharge the purchaser or purchasers therefrom, and from being concerned to see to the application thereof, or being accountable for the non-application or mis-application thereof : And that the said C. D., his executors, administrators and assigns, shall, out of the monies arising from any sale in pursuance of the aforesaid power, in the first place, pay the expenses incurred on such sale, or otherwise in relation to the premises ; and, in the next place, apply such monies in or towards satisfaction of the monies for the time being due on the security of these presents ; and then pay the surplus (if any) of the monies arising from such sale to the said A. B., his heirs, or assigns : And that the aforesaid power of sale and other powers may be exercised by any person or persons for the time being entitled to receive and give a discharge for the monies then owing on the security of these presents : Provided always, that the said C. D., his executors, administrators, or assigns shall not be answerable for any involuntary losses

which may happen in the exercise of the aforesaid power and trusts, or any of them: And the said A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., his heirs and assigns, that the said A. B., now hath power to grant and release all and singular the said premises unto and to the use of the said C. D., his heirs and assigns in manner aforesaid, and free from incumbrances; and that he the said A. B., and his heirs, and every other person lawfully or equitably claiming any estate or interest in the premises, will at all times, at the request of the said C. D., his heirs, executors, administrators, or assigns, but at the cost of the said A. B., his heirs, executors, or administrators, execute and do all such assurances and acts, for further or better assuring all or any of the said premises to the use of the said C. D., his heirs and assigns in manner aforesaid, as by him or them shall be reasonably required. In witness whereof the said A. B. and C. D. have hereunto set their hands and seals the day and year first above written.

The Schedule to which the above written Indenture refers,

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PART II.

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THE LAW OF MORTGAGE

AS CONTAINED IN

THE TRANSFER OF PROPERTY ACT, 1882.

(ACT IV OF 1882.)

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# THE TRANSFER OF PROPERTY ACT, 1882.

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## THE SCHEDULE—ENACTMENTS REPEALED.

# ACT No. IV OF 1882.\*

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN  
COUNCIL.

*Received the assent of the Governor-General on the 17th  
February 1882.*

## AN ACT TO AMEND THE LAW RELATING TO THE TRANSFER OF PROPERTY BY ACT OF PARTIES.

WHEREAS it is expedient to define and amend certain  
parts <sup>(1)</sup> of the law relating to the  
transfer of property by act of parties :

Preamble.

It is hereby enacted as follows :—

[(<sup>1</sup>) The preamble was purposely drawn thus, following the lines of the preamble to the Indian Contract Act, 1872, because the Act is, so far as it deals with immoveable property and debts, only a partial measure. (See Select Committee's Report, dated 19th February 1879, para. 5.)]

## CHAPTER I.

### PRELIMINARY.

1. This Act may be called "The Transfer of Property  
Short title. Act, 1882."

Commencement. It shall come into force on the first  
day of July, 1882.

It extends in the first instance to the whole of British  
India except the territories respectively  
Extent. administered by the Governor of  
Bombay in Council, the Lieutenant-Governor of the Panjáb  
and the Chief Commissioner of British Burmah.

But any of the said Local Governments may, from time  
to time, by notification in the local official Gazette, extend

\* The amendments enacted by Act III of 1885 are incorporated in the Act as here printed.

this Act to the whole or any specified part of the territories under its administration. <sup>(1)</sup>

And any Local Government may, with the previous sanction of the Governor-General in Council, from time to time, by notification in the local official Gazette, exempt, either retrospectively or prospectively, any part of the territories administered by such Local Government from all or any of the following provisions, namely :—

“ Sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three. <sup>(2)</sup>

Notwithstanding anything in the foregoing part of this section, sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, 1877, under the power conferred by the first section of that Act or otherwise. <sup>(3)</sup>

[<sup>(1)</sup> See *ante*, pp. 110, 139.

The Act has not as yet been extended to any province under the power conferred by this clause.

<sup>(2)</sup> This is the clause as amended by Act III of 1885 :—

In the Act as passed the clause ran as follows : “ And any Local Government may, with the previous sanction of the Governor-General in Council, from time to time, by notification in the local official Gazette, exempt, either retrospectively or prospectively, throughout the whole or any part of the territories administered by such Local Government, the members of any race, sect, tribe or class from all or any of the following provisions, namely, sections forty-one, fifty-four, paragraphs two and three, fifty-nine, sixty-nine, one hundred and seven, and one hundred and twenty-three.”

It will be observed that the clause as it now stands differs from this clause in two respects : first, it substitutes a power to exempt *locally* for the power to exempt *personally* formerly given ; and, secondly, it gives no power at all to exempt from the provisions of sections 41 and 69, the former of which section relates to transfer by ostensible owners, and the latter to powers of sale. For the reasons for these changes see paras. 1 to 14 of the Statement of



Objects and Reasons, dated 9th August 1884, and paras. 2 and 3 of the Report of the Select Committee, dated 21st January 1885, on the Bill passed as Act III of 1885 (see the *Gazette of India* of the 23rd August 1884 and the 31st January 1885 respectively). The speech of the Hon'ble Mr. Ilbert, when moving for leave to introduce the Bill (see the Abstract of Proceedings of the Legislative Council published in the Supplement to the *Gazette of India*, of the 9th August 1884) may also be usefully consulted in connection with this clause. As the clause now stands the only section relating to mortgages from which it gives power to exempt is section 59, declaring when a mortgage is to be by assurance.

(3) This clause was added to the Act by section 2 of Act III of 1885, which declares that it "shall be deemed to have been added to the first section of the said Act (*i.e.*, the Transfer of Property Act, 1882) from the date on which it came into force." Its introduction is thus explained in para. 15 of the Statement of Objects and Reasons, dated 9th August 1884, to the Bill passed as Act III of 1885. "Section 2 of the Bill is intended merely to remove a formal defect in the Act, which has been brought to notice in the course of the recent discussions. It was of course never intended that the provisions of the Act, which assume the existence of a registration system, should take effect in those tracts which are excluded from the operation of the Registration Act; but the Act omitted to make any express provision to that effect, and that omission is now supplied."]

2. In the territories to which this Act extends for the time being the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. (1) But nothing herein contained shall be deemed to affect (2)—

(a) the provisions of any enactment not hereby expressly repealed (3):

Saving of certain enactments, incidents, rights, liabilities, &c.

(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force (4):

(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability (5): or,

(d) save as provided by section fifty-seven, and chapter four of this Act (6), any transfer by operation of law, or

by, or in execution of, a decree or order of a Court of competent jurisdiction : and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law.

[(<sup>1</sup>) As the Act has not yet been extended either to Bombay or the Panjáb, Bombay Regulation V of 1827, s. 15 and the provisions of Act IV of 1872, relating to Bengal Regulations I of 1798 and XVII of 1806, included in the Schedule, are still unrepealed, whilst Bengal Regulations I of 1798 and XVII of 1806 remain in force in the Panjáb.

(<sup>2</sup>) *i.e.*, affect *in malam partem*, derogate from, wholly or in part. (See the speech of the Hon'ble Mr. Ilbert when moving for leave to introduce the Bill to amend the Transfer of Property Act, published in the Supplement to the *Gazette of India* of the 9th August 1884.)

(<sup>3</sup>) This clause is copied from the Indian Contract Act, 1872, s. 1, last clause, and one of its effects is described by the Select Committee (see their Report, dated 19th February 1879, p. 34) to be "to maintain intact the statutory force which the Legislature has given to local usage in these two *pays de coutumes*—the Panjáb\* and Oudh." For a list of the various enactments more specially bearing on the law of mortgage which this clause saves see the Index to the enactments relating to India, second edition, Title "Mortgagor and Mortgagee." As pointed out by Mr. Ilbert in the speech above referred to, the saving in this section does not apply to cases in which the Act merely *supplements* another enactment as it does the Registration Act.

(<sup>4</sup>) Compare the Indian Contract Act, 1872, s. 1, last clause.

When introducing this clause the Select Committee said (see their Report, dated 2nd February 1878, para. 3) : "We have also saved all incidents of contracts not inconsistent with the provisions of the Bill. Besides the Malabar mortgagee's option" (as to this see *ante*, p. 22) "which the Bill as introduced expressly preserved, there must be many other incidents of native contracts with which it is desirable not to interfere." So far as mortgages are concerned this clause does not appear to be of much importance, since s. 98 specially provides for all exceptional mortgages.

(<sup>5</sup>) There can be no question as to the *general* effect of this clause so far as mortgages are concerned. It declares that any right or liability arising out of a mortgage entered into before the 1st day of July 1882, and any relief in respect of any such right or liability

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\*At the time this report was written the Bill purported to extend to the whole of British India.

shall not be injuriously affected [see *supra*, p. 613 note (2)] by anything contained in the Act. The particular application of the clause is not however so clear, and has lately formed the subject of a Full Bench decision in the N. W. P.\* The question in that case was whether the clause saved the procedure prescribed by Bengal Regulation XVII of 1806 for the foreclosure of mortgages by conditional sale, and it was held by the Full Bench (*Stuart*, C.J., dissenting) that it did not. *Oldfield* and *Straight*, JJ., were the only Judges of the majority of the Full Bench who gave their opinions at any length, and it would seem from their judgments that the decision of the majority rested on two points : first, that in the case of a mortgage entered into before the 1st July 1882 the mortgagee had no vested right to have recourse to the procedure prescribed by Bengal Regulation XVII of 1806, and therefore that the substitution of a new procedure by the Act could not be held to affect any "right" within the meaning of the clause ; and, secondly, that even if the mortgagee had in such a case a "right" to the procedure prescribed by the Regulation, the Act had not injuriously affected such right, inasmuch as the mortgagee was as well off under the procedure prescribed by the Act as that prescribed formerly by the Regulation. On the other hand, *Stuart*, C.J., held that not only had the mortgagee a right to the procedure by notice and foreclosure which was in force under the Regulation at the time when the mortgage deed was executed, but further that this right had been injuriously affected by the Act.

It seems doubtful whether the view of the learned Chief Justice in so far as it declares that the mortgagee had a right to the procedure prescribed by the Regulation, is correct. On this point the view of the majority of the Court would appear, for reasons given in the judgments of *Oldfield* and *Straight*, JJ., to be more in accordance with general principles. At the same time it is submitted with great deference that, even if the view of the majority of the Court on this point is accepted, it does not follow, as the Court seemed to assume, that the clause does not save the procedure prescribed by the Regulation. The clause saves not merely rights and liabilities, but also "any relief in respect of any such right or liability," which words must refer to something different from the right or liability in question. In the judgment of the Court these words appear to have been ignored, but it is submitted that they were inserted precisely in order to meet cases like that before the Court. After saving the "rights" of the parties, the clause proceeds to save the "relief" to which the parties are entitled in respect of these rights, that is, the remedy which the parties are entitled to require the Court to apply if their rights are interfered with or interrupted by third

\* *Ganga Sahai v. Kishon Sahai*, I. L. R. 6 All. 262 (F. B.)

parties, and the mode in which the Courts are bound by law to apply the remedy would appear to be an integral part of this "relief." In this view, granted that the mortgagee in the case in question had no right to a particular procedure, he had clearly a right to foreclose his mortgage after the expiry of the stipulated period, and the provisions of Bengal Regulation XVII of 1806 which prescribe the mode in which he is entitled to require the Court to enforce this right, would seem to prescribe the *relief* to which he was entitled in respect of his right. Unless we give some such meaning as this to the word "relief" we must (as the judgment in question appears to have done) treat the last words of the clause as practically a dead letter; and this we ought not to do unless it is absolutely impossible to assign any intelligible meaning to them (see *Hardcastle's Statutory Law*, p. 40.)

As to the other point, though, no doubt, as pointed out by *Olfield* and *Straight, J.J.*, the Act allows the Court, upon good cause shown, to extend the time for payment indefinitely, still the Act affects the relief to which the parties are entitled very materially; for it takes away the absolute right to a year's notice which the mortgagee has under the Regulation in every case; though under the Act, the Court may, if it think fit, enlarge the time for payment for any number of years, it is not bound to give the mortgagee even one month for payment. The whole matter is left in the hands of the Court, which may in its discretion give the mortgagee practically no time or an indefinite time for redemption. This change in the law, therefore, does, it is submitted, injuriously affect the relief to which the parties are entitled.

(<sup>6</sup>) This is the Chapter on Mortgages, so the provisions of this clause do not apply in the case of Mortgages.]

Interpretation-clause.

or context,—

"immoveable property:"

crops or grass (<sup>1</sup>):

"instrument:"

"registered" means registered in British India under the

"registered:"

ments: (<sup>2</sup>)

"attached to the earth:"

3. In this Act, unless there is something repugnant in the subject

"immoveable property" does not include standing timber, growing

"instrument" means a non-testamentary instrument:

law for the time being in force regulating the registration of documents:

"attached to the earth" means—

(a) rooted in the earth, as in the case of trees and shrubs ;

(b) imbedded in the earth, as in the case of walls or buildings ; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached :

and a person is said to have "notice" of a fact when he actually knows that fact, or when, "notice:" but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229 (3).

[(1) With the particular exceptions, stated in the definition, immoveable property must, in this Act as elsewhere, be held to "include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth" (see Act I of 1868, sec. 2, clause 5).

(2) The present law is Act III of 1877, for which see *ante* Chap. V. generally.

(3) This definition was inserted by the Law Commissioners of 1879 (see their Report, dated 15th November 1879, p. 29). It is very similar to the definition in the Indian Trusts Act, 1882, s. 3, the only difference being the addition of the words "or search" after the words "from an enquiry" which were inserted by the Select Committee (see their third Report, dated 11th March 1881, para. 3) in order to make the definition apply expressly to a case where a person wilfully abstains from a search in a register which he ought to have made.

The circumstances mentioned in s. 229 of the Indian Contract Act are that the information has been obtained by the agent "in the course of the business transacted by him for the principal."]

Enactments relating to contracts to be taken as part of Act IX of 1872.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872 (1).

And sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall be read as supplemental to the Indian Registration Act, 1877 <sup>(2)</sup>.

[<sup>(1)</sup> The Law Commissioners of 1879 (see their Report, dated 15th November 1879, p. 29) made the following observations in connection with this provision: "We would declare that all chapters and sections of the Bill which relate to contracts should be taken as part of the Contract Act, 1872. When the body of substantive civil law enacted for India is re-arranged in a more compact and convenient form than that of a series of fragmentary portions from time to time passed by the Legislature, the chapters on Sale, Mortgage, Lease and Exchange, contained in the present Bill, will probably be placed in close connection with the rules contained in the Contract Act. But till then they may fitly be left in a law containing what the Contract Act does not contain, namely, general rules regulating the transmission of property between living persons."

The effect of this provision is to give all the words occurring in this Act and defined in the Contract Act the meanings attributed to them respectively by that Act.

<sup>(2)</sup> This provision was added to the Act by Act III of 1885. It is thus explained in para. 16 of the Statement of Objects and Reasons (published in the *Gazette of India*, dated 23rd August 1884): "The addition which it is proposed to make to s. 4 of the Act by s. 3 of the Bill" (*i.e.*, the provision now under consideration) "has for its object merely to remove a difficulty which has been felt in some quarters as to the bearing which the provisions of the Act relating to registration and the Registration Act have on one another;" and for a more particular description of the difficulties referred to see the speech of the Honorable Mr. Ilbert when moving for leave to introduce the Bill at p. 183 of the Abstract of the Proceedings of the Legislative Council on the 6th August 1884 (published in the Supplement to the *Gazette of India* of the 9th August 1884.)

Section 59 (Mortgage when to be by assurance) is the only one of the sections referred to in the clause which relates to Mortgages.]



## CHAPTER II.\*

## OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A).—*Transfer of Property, whether moveable or immoveable.*

5. In the following sections "transfer of property"

"Transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons, and "to transfer property" is to perform such act (1).

[(1) As the Act now stands there is no definition of the word "property." But it is pretty clear from the context that the word is used in this section as elsewhere throughout the Act as meaning *the thing* or subject in respect of which there is ownership, and not the ownership in respect of a thing or object. At first sight it would seem that to give this definition to the word would be to exclude a mortgage from the scope of this section. For a mortgage is not an act by which a living person conveys property, *i.e.*, the subject of ownership, in present or in future, to one or more other living persons, but an act by which a living person conveys only "an *interest in* property" (see s. 58) to one or more other living persons. We must, however, read s. 5 in connection with s. 8, which practically says that, where there is an intention, expressed or necessarily implied, to pass less than the whole interest of the transferor in the property, a transfer of property only passes to the transferee so much of the interest in the property as it is intended to pass. This is the intention in the case of a mortgage which may therefore be held to be a "transfer of property" within the meaning of s. 5, though it only passes a limited interest in the property to the transferee. At the same time there can be no doubt that s. 5 is awkwardly drawn when read in connection with s. 58, or indeed with any of the other definitions in the Act (see ss. 54, 105 and 118), except perhaps that of a gift (see s. 122.)

The section would, it is submitted, have been more appropriate had it been restricted to a definition of the word "transfer," and ran, as it did in the Bill, until it reached its very last stage, as follows—

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\* As the provisions of this chapter only apply to mortgages, in so far as they have any application, in common with all other kinds of transfers of property, it has not been considered necessary to notice them save in a cursory manner, pointing out such provisions as do apply. Their detailed examination would be beyond the scope of this work, which professes only to treat of mortgages,



"In the following sections, 'transfer' means an act by which one living person conveys to one or more other persons, or to himself and one or more other persons, in present or in future, *the ownership of property or an interest therein*, and 'to transfer' is to perform such act."

Why the section was altered into its present form does not appear from the Final Report of the Select Committee, dated 24th January 1882. They say, however, (para. 5) that they have omitted the definitions of "ownership" and "property" as unnecessary, and it is probable that the alteration of s. 5 was connected with the omission of these definitions.\*]

6. Property of any kind may be transferred, (') except  
 What may be trans- as otherwise provided by this Act or  
 ferred. by any other law for the time being  
 in force :

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the dominant heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(e) A mere right to sue for compensation for a fraud or for harm illegally caused cannot be transferred.

(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(g) Stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred.

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\* In connection with this section the remarks of *Mahmood, J.*, in *Gopal Panday v. Parsotam Das*, I.L.R. 5 All. 121 (F.B.) (cf. pp. 131 and 137,) on the meaning of the word "transfer," may be usefully considered.

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby <sup>(\*)</sup>; or (2) for an illegal purpose <sup>(\*)</sup>; or (3) to a person legally disqualified to be transferee <sup>(\*)</sup>.

(i) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue or the lessee of an estate under the management of a Court of Wards to assign his interest as such tenant, farmer or lessee <sup>(\*)</sup>.

[(1) See *ante*, pp. 288, 290.]

In the case of a mortgage as defined by s. 58 of the Act the transfer *must* be of "an interest in *specific immoveable property*."

<sup>(2)</sup> Thus, for example, a Hindu widow who has only a limited interest in the estate of her husband during her life cannot, in the absence of legal necessity, make a mortgage of the property which will bind the property in the hands of the heirs after her death, (see *ante*, pp. 71, *et seq.*)

<sup>(3)</sup> Such is a mortgage which is given for an immoral consideration, which is void; (see 1 Fisher's Law of Mortgage, 3rd ed., pp. 247, *et seq.* See also *ante*, p. 169.)

<sup>(4)</sup> Persons incompetent to contract (see as to these, the Indian Contract Act, 1872, s. 11) cannot apparently become mortgagees. It has been held, however, by *Stuart, C.J.*, that a minor may take a mortgage.\* But those remarks seem to have been made with special reference to the English law, and it is not clear how far they would be in point with regard to cases coming under the Indian Contract Act. (See also the observations at pp. 57 and 58 of Cunningham's Indian Contract Act, 4th ed.)

<sup>(5)</sup> This clause was added to the Act by s. 4 of Act III of 1885.]

7. Every person competent to contract and entitled to transfer, Persons competent to transfer, to dispose of transferable property not his own, is competent to transfer such property either

\* *Behari Lal v. Beni Lal*, I.L.R. 3 All. 408, referred to *ante*, p. 48.

wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force <sup>(1)</sup>.

[<sup>(1)</sup> See *ante*, pp. 25, 288, 290.

As to the persons competent to mortgage, see *ante*, Chap. III generally.]

8. Unless a different intention is expressed or necessarily

implied, <sup>(1)</sup> a transfer of property  
Operation of transfer. passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof <sup>(2)</sup>.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and, where the property is machinery attached to the earth, the moveable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

[<sup>(1)</sup> See *ante*, pp. 288, 290, and p. 618, note on s. 5.

In the case of a mortgage there is always an intention, expressed or implied, to pass less than all the interest of the mortgagor in the property.

<sup>(2)</sup> Any question as to legal incidents can only arise in the cases of a mortgage when possession is given.]

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law <sup>(1)</sup>.  
Oral transfer.

[<sup>(1)</sup> See *infra*, p. 655, sec. 59, which states when a writing is expressly required by law in case of a mortgage.]

10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein <sup>(1)</sup>.

[<sup>(1)</sup> Though this and the following sections, down to and including s. 35 nominally apply, in common with the rest of the chapter, to the case of all transfers, they have no practical application so far as transfers by way of mortgage are concerned. They are all taken from the draft rules relating to the transfer of property which the English Law Commissioners submitted with their sixth Report, dated 28th May 1870, all of which, with the exception of the rules corresponding with ss. 14 and 35, were expressly limited so far as instruments *inter vivos* were concerned to settlements or instruments whereby the owner conveys property or creates any interest therein *otherwise than by way of sale, or of charge, or of absolute gift*. The Law Commissioners of 1879, however, when incorporating these sections in the Bill, did away with this limitation, and thus these sections have become nominally applicable in the case of all transfers.]

11. Where, on a transfer of property, an interest there-  
Restriction repugnant in is created absolutely in favour of  
to interest created. any person, but the terms of the  
transfer direct that such interest shall be applied or enjoyed

by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner (').

[(<sup>1</sup>) Compare Act X of 1865, s. 125, and see *supra*, p. 622, the note to section 10.]

12. Where property is transferred subject to a condition or limitation making any interest

Condition making  
interest determinable  
on insolvency or at-  
tempted alienation.

therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him (').

[(<sup>1</sup>) Compare Act X of 1865, s. 107, and see *supra*, p. 622, the note to section 10.]

13. Where, on a transfer of property, an interest there-

Transfer for benefit  
of unborn person.

in is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property (').

#### *Illustration.*

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the

eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

[(<sup>1</sup>) Compare Act X of 1865, s. 100, and see *supra*, p. 622, the note to section 10.]

**14.** No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong (<sup>1</sup>).

Rule against perpetuity.  
[(<sup>1</sup>) Compare Act X of 1865, s. 101, and see *supra*, p. 622, the note to section 10.]

**15.** If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections thirteen and fourteen, such interest fails as regards the whole class. (<sup>1</sup>)

Transfer to class some of whom come under sections 13 and 14.

[(<sup>1</sup>) See *supra*, p. 622, the note to section 10.]

**16.** Where an interest fails by reason of any of the rules contained in sections thirteen, fourteen and fifteen, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails. (<sup>1</sup>)

Transfer to take effect on failure of prior transfer.

[(<sup>1</sup>) See *supra*, p. 622, the note to section 10.]

**17.** The restrictions in sections fourteen, fifteen and sixteen shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind. (<sup>1</sup>)

Transfer in perpetuity for benefit of public.

[(<sup>1</sup>) See *supra*, p. 622, the note to section 10.]

18. Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed.

*Exception.*—Where the property is immoveable, or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date ; and at the end of the year such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed.(')

[(<sup>1</sup>) Compare Act X of 1865, s. 104, and see *supra*, p. 622, the note to section 10.]

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

*Explanation.*—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.(')

[(<sup>1</sup>) See *supra*, p. 622, the note to section 10.]



**20.** Where, on a transfer of property, an interest therein

When unborn person acquires vested interest on transfer for his benefit.

is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth. <sup>(1)</sup>

[<sup>(1)</sup> See *supra*, p. 622, the note to section 10.]

**21.** Where, on a transfer of property, an interest therein

Contingent interest.

is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

*Exception.*—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent. <sup>(1)</sup>

[<sup>(1)</sup> Compare Act X of 1865, s. 107, and see *supra*, p. 622, the note to section 10.]

**22.** Where, on a transfer of property, an interest therein

Transfer to members of a class who attain a particular age.

is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age. <sup>(1)</sup>

[<sup>(1)</sup> Compare Act X of 1865, s. 108, and see *supra*, p. 622, the note to section 10.]

23. Where, on a transfer of property, an interest therein

Transfer contingent  
on happening of speci-  
fied uncertain event.

is to accrue to a specified person if a  
specified uncertain event shall happen,  
and no time is mentioned for the occur-

rence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.<sup>(1)</sup>

[(<sup>1</sup>) Compare Act X of 1865, s. 111, and see *supra*, p. 622, the note to section 10.]

24. Where, on a transfer of property, an interest therein

Transfer to such of  
certain persons as sur-  
vive at some period not  
specified.

is to accrue to such of certain persons  
as shall be surviving at some period,  
but the exact period is not specified,

the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer. (<sup>1</sup>)

#### *Illustration.*

A transfers property to B for life, and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

[(<sup>1</sup>) Compare Act X of 1865, s. 112, and see *supra*, p. 622, the note to section 10.]

25. An interest created on a transfer of property and

Conditional transfer.

dependent upon a condition fails if the  
fulfilment of the condition is im-

possible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.<sup>(1)</sup>

#### *Illustrations.*

(a). A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.

(b). A gives Rs. 500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The transfer is void.

(c). A transfers Rs. 500 to B on condition that she shall murder C. The transfer is void.

(d). A transfers Rs. 500 to his niece C if she will desert her husband. The transfer is void.

[(<sup>1</sup>) Compare Act X of 1865, ss. 113 and 114, and see *supra*, p. 622, the note to section 10.]

**26.** Where the terms of a transfer of property impose Fulfilment of condi- a condition to be fulfilled before a  
tion precedent. person can take an interest in the  
property, the condition shall be deemed to have been fulfilled if it has been substantially complied with. (<sup>1</sup>)

### *Illustrations.*

(a). A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.

(b). A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

[(<sup>1</sup>) Compare Act X of 1865, s. 115, and see *supra*, p. 622, the note to section 10.]

**27.** Where, on a transfer of property, an interest therein Conditional transfer is created in favour of one person,  
to one person coupled and by the same transaction an ul-  
with transfer to another terior disposition of the same interest  
on failure of prior dis- is made in favour of another, if the  
position. prior disposition under the transfer shall fail, the ulterior  
prior disposition shall take effect upon the failure of the prior  
disposition, although the failure may not have occurred in  
the manner contemplated by the transferor.

But where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner. (<sup>1</sup>)

*Illustrations.*

(a). A transfers Rs. 500 to B on condition that he shall execute a certain lease within three months after A's death, and if he should neglect to do so, to C. B dies in A's lifetime. The disposition in favour of C takes effect.

(b). A transfers property to his wife; but in case she should die in his lifetime, transfers to B that which he had transferred to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect.

[(<sup>1</sup>) Compare Act X of 1865, ss. 116 and 117, and see *supra*, p. 622, the note to section 10.]

### 28. On a transfer of property an interest therein may

Ulterior transfer conditional on happening or not happening of specified event.

be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections ten, twelve, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five and twenty-seven.<sup>(1)</sup>

[(<sup>1</sup>) Compare Act X of 1865, s. 118, and see *supra*, p. 622, the note to section 10.]

### 29. An ulterior disposition of the kind contemplated by

Fulfilment of condition subsequent.

the last preceding section cannot take effect unless the condition is strictly fulfilled. (<sup>1</sup>)

*Illustration.*

A transfers Rs. 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor or marries without C's consent, the Rs. 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

[(<sup>1</sup>) Compare Act X of 1865, s. 119, and see *supra*, p. 622, the note to section 10.]

Prior disposition not affected by invalidity of ulterior disposition.

### 30. If the ulterior disposition is not valid, the prior disposition is not affected by it.<sup>(1)</sup>

*Illustration.*

A transfers a farm to B for her life, and, if she do not desert her husband, to C. B is entitled to the farm during her life as if no condition had been inserted.

[(<sup>1</sup>) Compare Act X of 1865, s. 120, and see *supra*, p. 622, the note to section 10.]

**31.** Subject to the provisions of section twelve, on a

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen. (<sup>1</sup>)

*Illustrations.*

(a). A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

(b). A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

[(<sup>1</sup>) Compare Act X of 1865, s. 121, and see *supra*, p. 622, the note to section 10.]

**32.** In order that a condition that an interest shall cease

Such condition must not be invalid.

to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest. (<sup>1</sup>)

[(<sup>1</sup>) Compare Act X of 1865, s. 122, and see *supra*, p. 622, the note to section 10.]

**33.** Where, on a transfer of property, an interest therein

Transfer conditional on performance of act, no time being specified for performance.

is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when

he renders impossible, permanently or for an indefinite period, the performance of the act. (¹)

[ (¹) Compare Act X of 1865, s. 123, and see *supra*, p. 622, the note to section 10.]

34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled. (¹)

[ (¹) Compare Act X of 1865, s. 124, and see *supra*, p. 622, the note to section 10.]

#### *Election.*

35. Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject nevertheless,  
where the transfer is gratuitous, and the transferor has before the election died or otherwise become incapable of making a fresh transfer,  
and in all cases where the transfer is for consideration,  
to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

*Illustration.*

The farm of Sultánpur is the property of C and worth Rs. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, A dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to B.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.

*Exception to the last preceding four rules.*—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on



whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

### *Illustration.*

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority. (1)

[(1) Compare Act X of 1865, ss. 168, 169, and 171—177, and see *supra*, p. 622, the note to section 10.]

### *Apportionment.*

36. In the absence of a contract or local usage to the

Apportionment of periodical payments on determination of interest of person entitled.

contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof. (1)

[(1) This and the following section would appear to be applicable in the case of usufructuary mortgages.]

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the Local Government by notification in the official Gazette so directs. (1)

### *Illustrations.*

(a). A sells to B, C and D a house situate in a village and leased to E at an annual rent of Rs. 30 and delivery of one fat sheep, B having provided half the purchase-money and C and D one quarter each. E, having notice of this, must pay Rs. 15 to B, Rs.  $7\frac{1}{2}$  to C, and Rs.  $7\frac{1}{2}$  to D, and must deliver the sheep according to the joint direction of B, C and D.

(b). In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for A. B, C and D severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such directions as B, C and D may join in giving.

(1) See *supra*, p. 633, the note to section 36.]

*B.—Transfer of Immoveable Property.*

38. Where any person, authorized only under circumstances in their nature variable to

Transfer by person authorized only under certain circumstances to transfer.

dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith. (')

*Illustration.*

A, a Hindú widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

[(') For mortgages by persons authorized only under certain circumstances to mortgage, see *ante*, Chap. III generally.

The section seems generally to be in accordance with the decided cases there referred to, and would of course apply in the case of a transfer by way of mortgage, as much as in the case of a transfer by sale to which the Illustration is limited.]

39. Where a third person has a right to receive maintenance, or a provision for advancement

Transfer where third person is entitled to maintenance.

or marriage, from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands. (')

*Illustration.*

A, a Hindú, transfers Sultánpur to his sister-in-law B, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that if she is dispossessed of Sultánpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith without notice of the agreement. B is dispossessed of Sultánpur. She has no claim on the villages transferred to C.

[<sup>(1)</sup> For the right of a Hindu widow to maintenance see *ante*, pp. 97-99. The section would seem to be applicable to a transfer by way of mortgage].

40. Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property or to compel its enjoyment in a particular manner, or

Burden of obligation imposing restriction on use of land.

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon,

or of obligation annexed to ownership but not amounting to interest or easement.

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands. (<sup>1</sup>)

*Illustration.*

A contracts to sell Sultánpur to B. While the contract is still in force he sells Sultánpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

[<sup>(1)</sup> The Select Committee in their third Report, dated 11th March 1881, p. 2, say of this section, which then formed one section together with the present s. 39: "The remainder of s. 40, though suggested by English cases, is, in our opinion, founded on general principles of equity applicable to India, and may therefore fitly be left unaltered in the Bill." The cases of

*Wilson v. Hart*,\* *Richards v. Revitt*,† and *McLean v. McKay*,‡ would appear from the marginal reference in the Bill as settled by the Law Commissioners to be some of the English cases referred to.

The section would no doubt apply in the case of a transfer by mortgage with possession.]

41. Where, with the consent, express or implied, of the  
 Transfer by ostensible owner. persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith. (1)

[(1) This section was thus described by the Hon'ble Mr. Ilbert when moving for leave to introduce the Bill to amend the Transfer of Property Act (see the Proceedings of the Legislative Council, dated 6th August 1884, p. 182, published in the Supplement to the *Gazette of India*, of the 9th August 1884).—

“This section is based on the principle that where one of two innocent persons must suffer from the fraud of a third party, the loss should fall on him who has created or could have prevented the opportunity for the fraud, and that in such cases hardship is caused by the strict enforcement of the general rule that no one can confer a higher right on property than he himself possesses. This principle is generally recognized in the jurisprudence of all civilized nations, and lies at the bottom of such legislation as the English Factors Act.” This was one of the sections from which s. 1 of the Act as originally passed gave power to exempt the members of any race, sect, tribe or class, and it was at first proposed in the amending Bill to continue this power of exemption in a modified form (see the Statement of Objects and Reasons, dated 9th August 1884, paras. 11 and 12, published in the *Gazette of India*, dated 23rd August 1884), but the Select Committee decided that it was unnecessary to give a power to exempt from the section on the ground that it contained a rule of equity which the Courts should follow, and which they probably would follow even if the section were excluded from the Act (see the Report of the Select Committee dated 21st January 1885, para. 3, published in the *Gazette of India*, dated 31st January 1885). The section is clearly applicable in the case of all transfers, including mortgages.]

\* L. R. 1 Ch. 463. † L. R. 7 Ch. D. 224. ‡ L. R. 5 P. C. 327.

**42.** Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power. (1)

Transfer by person having authority to revoke former transfer.

#### *Illustration.*

A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

[(1) This section would seem to have no practical application in the case of a mortgage.]

**43.** Where a person erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists.

Transfer by unauthorized person who subsequently acquires interest in property transferred.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option. (1)

#### *Illustration.*

A, a Hindú, who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

[(1) See *ante*, pp. 303-304. This section is clearly applicable in the case of a mortgage. Thus it was held by *Garth, C.J.*,



and *Wilson, J.*, in an unreported Calcutta case\* that it is the general rule of equity that where a mortgagor purports to convey particular property and has not the title under which he professes to convey, the mortgage must be satisfied out of any title which the mortgagor then has or afterward acquires in the same property.

See also the cases cited in 2 *Dart's Vendors and Purchasers*, 5th ed., pp. 808-809 ; and *Sugden's Vendors and Purchasers*, 13th ed., pp. 297-298.]

44. Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house. (1)

[ (1) For the difference in the law between Bengal and other parts of India as to legal competency of one of several co-owners, being members of a Hindu joint family, to transfer his share, see *ante*, pp. 69-70.

In Bengal, it has been held under the Regulations that a mortgagee has no such right as to entitle him to sue for partition. (See *ante*, p. 285.)

This section gives a right to enforce a partition to all transferees, including, therefore, mortgagees, "so far as is necessary to give effect to the transfer."] ]

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\* *Bholanauth Dhur v. Dobay Churn Dey* (suit 597 of 1881), decided March 1st, 1883.



**45.** Where immoveable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property. (')

[(') Compare the rule laid down in Dart's Vendors and Purchasers, 5th ed., pp. 923-924. One of several joint mortgagees would apparently be entitled to have the extent of his interest in the mortgaged property determined according to the principles laid down in this section.]

**46.** Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and where such interests were of unequal value, proportionately to the value of their respective interests. (')

### *Illustrations.*

(a). A, owning a moiety, and B and C, each a quarter share, of mauza Sultānpur, exchange an eighth share of that mauza for a quarter share of mauza Lālpura. There being no agreement to the contrary, A is entitled to an eighth share in Lālpura, and B and C each to a sixteenth share in that mauza.

(7). A, being entitled to a life-interest in mauza Atrali and B and C to the reversion, sell the mauza for Rs. 1,000. A's life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400, A is entitled to receive Rs. 600 out of the purchase-money, B and C to receive Rs. 400.

[(<sup>1</sup>) One of several mortgagors having distinct interests in the mortgaged property would apparently be entitled to have his share of the mortgage-money determined according to the principle laid down in this section.]

#### 47. Where several co-owners of immoveable property

Transfer by co-owners of share in common property. transfer a share therein without specifying that the transfer is to take effect

on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and where they were unequal, proportionately to the extent of such shares. (<sup>1</sup>)

#### *Illustration.*

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mauza Sultānpur, transfer a two-anna share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of A, and half an anna share from each of the shares of B and C.

[(<sup>1</sup>) The principles laid down in this section would seem to be applicable to transfers by way of mortgage as well as other transfers.]

#### 48. Where a person purports to create by transfer at

Priority of rights created by transfer. different times rights in or over the same immoveable property, and such

rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created. (<sup>1</sup>)

[(<sup>1</sup>) See *ante*, pp. 266-267. In applying the principle here laid down to mortgages, the provisions of ss. 78 and 79, pp. 684-685, *infra*, should not be overlooked.]

49. Where immovable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property. (')

[(') See *infra*, pp. 675-677, sec. 72, and pp. 680-683, sec. 76, for the right of the mortgagee to insure and his duty to apply insurance money to reinstating the property.]

This section is in accordance with the doctrine laid down in *Garden v. Ingram*,\* where it was held that in the case of a mortgage of property insured under an existing policy, the benefit of the policy would, even without express stipulation, pass to the mortgagee with the property insured. See Coote on Mortgages, 4th ed., p. 227; 2 Fisher's Law of Mortgage, 3rd ed., p. 1077; and 2 Dart's Vendors and Purchasers, 5th ed., p. 812.]

50. No person shall be chargeable with any rents or profits of any immovable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits. (')

Rent *bonâ fide* paid to holder under defective title.

#### *Illustration.*

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

[(') Compare Act XI of 1855, s. 1, repealed by this Act. The principle of this section would apparently be applicable, when, to take a case such as that given in the Illustration, the transferee was an usufructuary mortgagee. For the rights of a mortgagee to rents and profits, see 2 Fisher's Law of Mortgage, 3rd ed., pp. 927-929.]

51. When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them. (1)

[<sup>(1)</sup> Compare Act XI of 1855, s. 2. This section can have no application to the case of a mortgage, as a mortgagee can never "believe in good faith that he is absolutely entitled" to the property.

As to improvements made by a mortgagee in possession, see *infra*, p. 676, note (\*) to cl. (b) of sec. 72.]

52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under

Transfer of property  
pending suit relating  
thereto.

any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose. (1)

[<sup>(1)</sup> See *ante*, pp. 298-301. For other cases bearing on the doctrine of *lis pendens* see *Tarrakant Bannerjee v. Puddomoney Dossee* (1); *Umamoyi Burmoneea v. Tarini Prasad Ghose* (2); *Fuzeelun Beebee v. Omdah Beebee* (3); *Digamburee Debia v. Eshan Chunder Sein* (4); *Puluck Dharee Roy v. Mohabeer Singh* (5); *Kailas Ohundra Ghose v. Fulchand Jaharri* (6); *Sreemutty Gourmoney Dabee v. Reed* (7); *Ram Lochun Sircar v. Ramnarain* (8); *Krishnappa valad Mahadappa v. Bahiru Yadavray* (9); *Balaji Ganesh v. Khushalji* (10); *Ravji Narayan v. Krishnaji Lakshman* (11); *Manuel Fruval v. Sanagapalli Latchmidevamma* (12); *Ghazee-ood-deen v. Bhookun Doobey* (13).

For the English Law, see 2 Fisher's Law of Mortgage, 3rd ed., pp. 582, *et seq.*

This section is clearly applicable to the case of a transfer by way of mortgage.]

**53.** Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.

Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate

(1) 5 W. R. (P. C.) 63.

(2) 7 W. R., 225.

(3) 10 W. R., 469.

(4) 15 W. R., 372.

(5) 23 W. R., 382.

(6) 8 B. L. R., 474.

(7) 2 Tay. and Bell, 83, and see note appended to that case at page 113.

(8) 1 C. L. R., 296 (*cf.* pp. 303 and 309).

(9) 8 Bom. H. C. (a. c. j.), 55.

(10) 11 Bom. H. C., 24.

(11) 11 Bom. H. C., 139.

(12) 7 Mad. H. C. 104 (*cf.* p. 111.)

(13) 2 N. W. P. (Agra) H. C. (1867) p. 301.

consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.<sup>(1)</sup>

[<sup>(1)</sup> Compare the provisions of the Statutes 13 Eliz., c. 5 and 27 Eliz., c. 4, both of which are repealed by this Act. See also 1 Fisher's Law of Mortgage, 3rd ed, pp. 222 *et seq.*—Title "Of Fraudulent Securities." This section is clearly applicable in the case of mortgages.]

### CHAPTER III.

#### OF SALES OF IMMOVEABLE PROPERTY.

54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

"Sale" defined.

Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

Sale how made.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

Contract for sale.

It does not, of itself, create any interest in or charge on such property.

**55.** In the absence of a contract to the contrary, the Rights and liabilities of buyer and seller. buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

(1) The seller is bound—

(a) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover ;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;

(d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place ;

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents ;

(f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits ;

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.



(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same :

provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power :

provided that (a), where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (b), where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require ; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and unadulterated, unless prevented from so doing by fire or other inevitable accident ;

(4) The seller is entitled—

(a) to the rents and profits of the property till the ownership thereof passes to the buyer ;

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part,

(5) The buyer is bound—

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;

(b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

(a) where the ownership of the property has passed to him to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him with notice of the

payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.

56. Where two properties are subject to a common charge, and one of the properties is sold, the buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend.

Sale of one of two properties subject to a common charge.

*Discharge of Incumbrances on Sale.\**

57. (a) Where immovable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court,

Provision by Court for incumbrances, and sale freed therefrom.

- (1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property,—of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and

\* Compare the provisions of the Conveyancing and Law of Property Act, 1881 (44 and 45 Vic. c. 41) s. 5.

- (2) in any other case of a capital sum charged on the property,—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(c) After notice served on the persons interested in or entitled to the money or fund in court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

## CHAPTER IV.

OF MORTGAGES OF IMMOVEABLE PROPERTY AND  
CHARGES.\*

58. (a). A mortgage is the transfer of an interest in specific immoveable property for "Mortgage," "mort- in specific immoveable property for  
gagor" and "mort- the purpose of securing the payment  
gagee" defined. of money advanced or to be advanced  
by way of loan, an existing or future debt, or the perform-  
ance of an engagement which may give rise to a pecuniary  
liability. (1)

The transferor is called a mortgagor, the transferee a mort-  
gagee; the principal money and interest of which payment  
is secured for the time being are called the mortgage-  
money, (2) and the instrument (if any) by which the trans-  
fer is effected is called a mortgage-deed.

(b). Where, without delivering possession of the mort-  
gaged property, the mortgagor binds  
Simple mortgage. himself personally to pay the mort-  
gage-money, and agrees, expressly or impliedly, that, in the  
event of his failing to pay according to his contract, the  
mortgagee shall have a right to cause the mortgaged  
property to be sold and the proceeds of sale to be applied,  
so far as may be necessary, in payment of the mortgage-  
money, the transaction is called a simple mortgage and  
the mortgagee a simple mortgagee. (3)

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\* It will be observed that the chapter treats only of mortgages of *Immoveable Property*. This limitation is intentional. "We have made it clear that the mortgages here dealt with are only mortgages of immoveable property and sub-mortgages. Mortgages of policies, ships, machinery, furniture, cattle and other moveable property require to be separately treated"—(Select Committee's Report, dated 2nd February 1878, para. 17). For what is immoveable property within the meaning of the chapter, see the definition in Act I of 1868, sec. 2, cl. 5, as modified by the definition in s. 3 of this Act, which declares that the term "does not include standing timber, growing crops or grass."

The Indian Contract Act, 1872, ss. 172-179, deals with the subject of pledges, but mortgages of moveable property have not yet been provided for by the Indian Legislature. As to the distinction between mortgages and pledges of moveable property, see 1 Fisher's Law of Mortgage, 3rd ed., pp. 24 and 64.

(c). Where the mortgagor ostensibly sells the mortgaged property—  
 Mortgage by conditional sale.

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.<sup>(1)</sup>

(d). Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.<sup>(2)</sup>

(e). Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.<sup>(3)</sup>

[<sup>(1)</sup> Compare the definitions *ante*, p. 1, and those in Coote's Law of Mortgage, 4th edition, p. 1; 1 Fisher's Law of Mortgage, 3rd edition, p. 1; Act XXVIII of 1866, s. 191; the Indian Stamp Act, 1879, s. 3 (13); and the Conveyancing and Law of Property Act, 1881, (44 and 45 Vic. c. 41) s. 2 (VI).]

The Indian Law Commissioners of 1879 thus explain and justify this definition: "The objection raised by one eminent critic that this chapter deals with 'matters which do not transfer



property but only create a charge upon it,' is one which seems to us to rest on an assumption that a transfer must of necessity extend to the whole property or interest of the transferor in the subject-matter of the transaction. We considering ownership as generally divisible have regarded the term 'transfer' as properly applicable to any interest carved out of the aggregate called 'ownership.' This is consistent with the English law. 'A security,' says Mr. Fisher, in his work on Mortgages, 'is a redeemable estate or right which one person has in the property of another' " (Report of Indian Law Commissioners, dated 15th November 1879, p. 32.)

The provision that the transfer must be of "*specific* immovable property" is in accordance with the existing law ; see *ante*, pp. 137-139.

The various objects to secure which a mortgage may be made are set out specifically in the definition, which is probably exhaustive in this respect. They might, however, have been summed up in the words of the definition in 44 and 45 Vic. c. 41, s. 2 (VI) as being "money or money's worth."

The "payment of money advanced or to be advanced by way of loan" and "an existing or future debt" are no doubt the more novel of the objects to secure which a mortgage is made.

Mortgages to secure the performance of an engagement which may give rise to a pecuniary liability are, however, not uncommon. Such are the security bonds which are so frequently given in this country, in which the sureties hypothecate land to secure the performance of an engagement by their principal. So again a mortgage to secure the repurchase of an exact sum of stock sold, instead of the payment of the sum of money advanced (a form of mortgage which is sometimes entered into when money is advanced by trustees who have no power to lend on mortgage, but who are desirous of accommodating a *cestui que trust*) is a mortgage to secure the performance of an engagement.

And a good example of a mortgage of the nature here defined will be found in *Nait Ram v. Shib Dat*,\* where the object of the mortgage was to secure the delivery by the mortgagors of a certain quantity of indigo on a certain day, and the parties had assessed the amount of the pecuniary liability which might arise in anticipation of a breach.

The word "engagement" is nowhere defined either in this Act or the Indian Contract Act, of which this Act is to be taken as part (see *ante*, s. 4.) An "engagement which may give rise to a pecuniary liability" would seem, however, to be equivalent to a contract as defined in s. 2 of the Indian Contract Act. It may be noted that the words "which may give rise to a pecuniary liability"

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\* I. L. R., 5 All. 238.



do not occur in the definition of "mortgage" in the Indian Stamp Act, which otherwise defines the objects to secure which a mortgage is given in the same way as this definition.

This definition has thus been referred to by *Mahmood*, J., in a recent case\*: "Mortgage, as understood in this country, cannot be better defined than by the definition adopted by the Legislature in s. 58 of the Transfer of Property Act (IV of 1882). That definition has not in any way altered the law; but, on the contrary, has only formulated in clear language the notions of mortgage as understood by all the writers of text-books on Indian mortgages."

(2) In defining "mortgage-money" the case of a mortgage to secure "the performance of an engagement" appears to have been overlooked. In the case of such mortgages it is obvious that what is secured is not "the payment of principal money and interest," but the performance of an engagement. No doubt the engagement "may give rise to a pecuniary liability," and the mortgage may thus indirectly secure the payment of this liability, but this is not the primary object of the mortgage.

(3) See *ante*, pp. 14-15.

The Bill, in its earlier stages, adopted the definition of "simple mortgage" there given almost *verbatim*, but in their Report, dated 11th March 1881, the Select Committee expressed an opinion that the expression "makes it" (*i.e.*, the property) "a collateral security for the repayment" was likely to give rise to difficulties. They accordingly recast the definition in its present shape, in which it seems rather to describe the rights of a mortgagee under such a mortgage than define a simple mortgage.

(4) See *ante*, pp. 15-20 and p. 21.

This definition differs from the definition of "mortgage by conditional sale" there given in this important respect that it does not exclude cases in which the mortgagee makes himself personally liable for repayment of the loan. Such cases are, it is believed, not uncommon in certain parts of the country.

(5) See *ante*, pp. 11-14.

This definition does not differ materially from the definition of "usufructuary mortgage" there given, but it may be observed that, as the definition is here worded, it would not appear to cover the case of a mortgage in which only a *part* of the rents and profits is to be received by the mortgagee, the rest being reserved for the mortgagor, or in which the agreement is simply that the mortgagee shall retain possession for a fixed term settled by the parties as sufficient for repayment of the loan, and then deliver up possession whether the mortgage-money has or has not been paid. (See, for example, the mortgage in *Sri Raja Setrucherla Ramabhadra*

\* *Gopal Panday v. Parsotham Das*, I. L. R. 5 All. 121 (*cf.* p. 137).

*Raju Bahadur v. Sri Raja Vairicherla Surianarayanaraju Bahadur*.<sup>\*</sup> Such cases must apparently be treated as "anomalous mortgages" (see *infra*, p. 706, s. 98.)

"Mortgage-money" as defined in cl. (a), includes both principal money and interest. It would seem, therefore, that for the words "mortgage-money" the second and third times they occur in this definition, the words "principal money" would have been more correctly substituted.

(<sup>6</sup>) Compare the definition of a legal mortgage of real estate as given in 1 Fisher's Law of Mortgage, 3rd Edition, p. 10. See also the description of the ordinary form of mortgage of freeholds in 1 Prideaux's Precedents, 12th Edition, pp. 451-452.]

### 59. Where the principal money secured is one hundred

rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Mortgage when to be by assurance.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.<sup>(1)</sup>

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.<sup>(2)</sup>

(<sup>1</sup>) See *ante*, pp. 110-111, 181 and 216-217.

This section does away with mortgages by mere verbal agreement, for it requires all mortgages (other than mortgages by deposit of title deeds, as to which see the last para. of the section) to be effected either by an instrument signed by the mortgagor and attested by at least two witnesses, or (except in the case of a simple mortgage, which must, therefore, always be effected by an instrument) by delivery of the property.

Moreover, where the principal money secured is one hundred rupees or upwards, the instrument must be registered. On this point the Select Committee make the following observations (see

<sup>\*</sup> I. L. R., 2 Mad., 314.

their third Report, dated 11th March 1881): "We agree with the Law Commissioners that the requirement of registration will not only discourage fraud and facilitate investigations of title, but that it will also preclude some difficult questions of priority. A majority of us, however, think that where the principal money secured is less than Rs. 100, the assurance need not be registered; and we have altered the Bill accordingly. Our colleague, Mr. Stokes, dissents from this alteration, as, in his opinion, all incumbrances should appear on the register; those who mortgage their property for small amounts, as a rule, require protection from fraud more than those who mortgage for large amounts, and the changes impending in the working of the law will deprive the requirement of registration of all hardship even in the pettiest cases."

This section does not, therefore, abolish "optional" registration, (that is, it does not make it compulsory to register instruments of mortgage when the principal amount secured is less than one hundred rupees), as s. 54 of the Act does in the case of sales (see as to this the remarks of *Garth, C.J.*, in *Narain Chunder Chuckerbutty v. Dataram Roy*,\* referred to by the Honorable Mr. Ilbert in his speech in Council on the 6th August 1884, when asking for leave to introduce the Bill to amend the Transfer of Property Act). On the other hand, the plain terms in which it refers to "the principal money secured" remove any doubt or difficulty so far as mortgages of immoveable property are concerned, upon the point discussed *ante* pp. 213—232, as to how the value of the right, title or interest created by a mortgage is to be estimated for the purpose of registration. (As to this see the remarks of *Straight and Oldfield, JJ.*, in *Habibullah v. Nacheed Rai*.†)

It will be observed that all instruments of mortgage require to be attested by two witnesses. In the case of an instrument of sale, no witnesses are required (see *ante*, p. 645, s. 54).

There is no definition in this Act or in the General Clauses Act of the word "signed." It is probable, however, that the affixing of a mark or stamped signature would, nevertheless, be held to be sufficient (compare the definition in s. 2 of the Code of Civil Procedure.)

The phrase "delivery of the property" is, it is presumed, meant to be equivalent to "delivery of possession of the property."

(2) See *ante*, pp. 111-113.

The history of this para. is peculiar. In the Bill as introduced it was declared that a deposit by a debtor of his title-deeds should be deemed to be only evidence of a contract for a mortgage and to entitle the creditor merely to sue for specific performance. The Select Committee, however, (see their further report, dated

\* I. L. R., 8 Calc., 597 (F.B.) (*cf.* p. 612.)

† I. L. R., 5 All., 447 (F.B.) (*cf.* p. 451.)

19th February 1879, para. 21) thought it better to say that a mortgage by deposit of title-deeds should be deemed to create a charge on the property comprised therein, and they altered the Bill accordingly. The Law Commissioners, to whom the Bill was next referred, thought that mortgages by deposit of title-deeds, should not be recognized (see their Report, dated 15th November 1879, p. 35). They accordingly cut out all reference to such mortgages from the Bill. But the Select Committee, who then reconsidered the Bill, took a different view, and inserted the present provision. They say (see their Report, dated 11th March 1881) "a majority of us are of opinion that equitable mortgages by deposit of title-deeds should be valid when they are made in Calcutta, Madras, Bombay, Rangoon and Karáchi. The practice of raising money on such securities has long been established in those towns, and any attempt to disturb it would cause much inconvenience. Here again Mr. Stokes dissents on the grounds (a) that such mortgages are opposed to the policy of the registration law; (b) that they lead to evasions of the stamp duty; (c) that they are at variance with the principle of making the system of transfer of immoveable property, as far as possible, a system of public transfer; and (d) that when the amount secured is Rs. 100 or upwards, they would be inconsistent with the general rule in s. 58 (now s. 59), requiring a written instrument."

As the exception is restricted in its application to the towns of Calcutta, Madras, Bombay, Karáchi and Rangoon, it follows that a mortgage cannot be made elsewhere by the simple delivery to a creditor, or his agent, of documents of title to immoveable property with intent to create a security thereon. Such a transaction would seem, however, to create a *charge* as defined in s. 100; for by it immoveable property is by act of parties made security for the payment of money to another, whilst, owing to the provisions of this section, the transaction does not amount to a mortgage. If so, then the effect of a delivery of title-deeds with the intent stated in the section would not appear to be very different, whether the delivery was made within or beyond the limits of the towns specified, though no doubt the rights of a person having a charge are not so extensive as those of a mortgagee (see *infra*, p. 709, note (2) on s. 100).

It will be observed that the section only requires the mortgage to be *made* in the towns referred to. The immoveable property need not be situated there. A mortgage by mere deposit of title-deeds of property situated in the mofussil would therefore seem to be valid if made in Calcutta, or in any of the other towns named.

Neither this section nor any other provision in the Act declares to what class mortgages by deposit of documents of title are to be assigned. In Bengal they are held to be simple mortgages (see *ante*, p. 111), and it seems pretty clear that, unless they can be held to be such, they must be treated as "anomalous mortgages" under s. 98.]

*Rights and Liabilities of Mortgagor.*

60. At any time after the principal money has become payable, <sup>(1)</sup> the mortgagor has a right, on payment or tender, <sup>(2)</sup> at a proper time and place, <sup>(3)</sup> of the mortgage-money, <sup>(4)</sup> to require the mortgagee (a) to deliver the mortgage-deed, if any, to the mortgagor, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished : <sup>(5)</sup>

Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court. <sup>(6)</sup>

The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money. <sup>(7)</sup>

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor. <sup>(8)</sup>

Right of mortgagor to redeem.

Redemption of portion of mortgaged property.

[(<sup>1</sup>) As to the time of redemption see *ante*, pp. 327-339 (for mortgages generally), pp. 378-386 (for usufructuary mortgages made previous to Act XXVIII of 1855), and p. 393 (for mortgages to which Bengal Regulation I of 1798 applied). This section fixes the time of redemption for all mortgages as "any time after the principal money has become payable." This must, it is submitted, be taken to mean "any time after the mortgagor is entitled to pay the principal money." If so, the question as to when the mortgagor becomes so entitled, which was discussed at length in *Sri Raja Setrucherla Ramabhadra Raju Bahadur v. Sri Raja Vairicherla Surianarayana Raju Bahadur*\* (see *ante* p. 336), has still to be decided in each case.

(<sup>2</sup>) As to payment or tender see *ante* pp. 367-369, 373-374, and 520-525.

Secs. 102 and 103 (see *infra* pp. 710-712) prescribe the procedure for making a tender in certain cases.

The provisions of this section must no doubt be read with s. 83 *infra*, which enables a mortgagor to deposit in Court the amount due on the mortgage. At the same time it is noticeable that there is no reference in this section as elsewhere [*cf.* s. 62, cl. (b)] to the right to deposit the money in Court.

(<sup>3</sup>) The Act does not define what is a "proper time and place" for a tender. For the English Law, see 2 Fisher's Law of Mortgage, 3rd edition, pp. 789-790.

(<sup>4</sup>) The payment or tender must be of the "mortgage-money" which is defined (s. 58) to be the principal *and interest* of which payment is secured for the time being. Cases in which the mortgage deed stipulates that the mortgagor shall be entitled to redeem on paying the principal only (see *ante*, p. 373) appear to have been here overlooked.

(<sup>5</sup>) As to redemption generally under the old law, see *ante*, Chap. VIII, especially pp. 377 *et seq.*

It will be observed that under this section the mortgagor may in any case require the mortgagee to retransfer the mortgaged property, or to execute an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished. It is believed that this will introduce a new rule in some parts of the country, where the practice at present is for the mortgagee simply to return or cancel the mortgage-deed and put the mortgagor in possession of the property, if he has been out of it. As the section stands, however, there is no need for the retransfer or acknowledgment to be by separate instrument, though it must in certain cases be registered, and it will probably, therefore, be usually made by endorsement on the back of the mortgage-deed.

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\* I. L. R., 2 Mad., 314.



The requirement of registration where the mortgage has been effected by registered instrument was introduced at the suggestion of the Law Commissioners of 1879 (see p. 32 of their Report, dated 15th November 1879.)

(<sup>6</sup>) For some cases in which the right to redeem is extinguished, see *ante*, pp. 335-336 and 348-350.

The "act of the parties" referred to in this proviso must mean an act done *after* the mortgage has been entered into, such as a release after the date of the mortgage of the right to redeem (see 2 Fisher's Law of Mortgage, 3rd edition, p. 722), or a sale in pursuance of a power of sale given by the mortgage-deed. Unless this is the proper construction to put on the words, mortgages by conditional sale, where the parties stipulate that on default of payment of the mortgage-money on a certain date the sale shall be absolute, would be included in the proviso. But this result could never have been intended, inasmuch as one of the main objects of this Act was to carry out the recommendation of the Privy Council in *Thumbusawmy Moodelly v. Hossain Rowthen*\* (see *ante*, pp. 17—20), namely, that an Act should be passed affirming the right of the mortgagor by conditional sale to redeem until foreclosure by a judicial proceeding, and giving to the mortgagee the means of obtaining such foreclosure. (See the speech of the Hon'ble Mr. Whitley Stokes when introducing the Bill at the Meeting of Council, dated 14th June 1877.)

(<sup>7</sup>) With regard to this provision the Select Committee in their third Report, dated 11th March 1881, say: "We think with Mr. Justice West" (one of the Law Commissioners who reported on the Bill in 1879) "that nothing in the section" (59 now 60) "declaring the mortgagor's right to redeem should invalidate any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass, or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money."

There is some confusion in the drafting of this clause. As it stands the words "or no such time has been fixed" are unintelligible. The intention of the clause apparently is that the mortgagee shall be entitled to reasonable notice before payment or tender of the mortgage-money, when no time for payment of the principal money has been fixed by the parties, or the mortgage-deed contains a provision that, if the time fixed for such payment has been allowed to pass, the mortgagee shall be entitled to notice before payment.

(<sup>8</sup>) As to redemption of portion of the mortgaged property, see *ante*, pp. 339-342 and 344-348.

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\* I. L. R., 1 Mad., (P.C.) (*cf.* p. 23.)



So far as it goes this clause seems to be in accordance with the existing law, but cases in which partial redemption is expressly or impliedly secured by the terms of the mortgage, or in which the indivisibility of a mortgage transaction is destroyed by the mortgagee's own conduct [compare on this point the corresponding provision as to the right of the mortgagee in s. 67, cl. (d)] are not noticed.]

61. A mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. (')

Right to redeem one of two properties separately mortgaged.

*Illustration.*

A, the owner of farms Z and Y, mortgages Z to B for Rs. 1,000. A afterwards mortgages Y to B for Rs. 1,000, making no stipulation as to any additional charge on Z. A may institute a suit for the redemption of the mortgage on Z alone.

[(1) See *ante*, p. 322.

This section, which is taken from s. 17 of the Conveyancing and Law of Property Act, 1881, (44 and 45 Vic. Chap. 41), alters the law as formerly in force in England, and as laid down in the Bombay case referred to at p. 322, *ante*.]

62. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property—

Right of usufructuary mortgagor to recover possession.

(a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid;

(b) where the mortgagee is authorized to pay himself from such rents and profits the interest of the principal money,—when the term (if any), prescribed for the payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in Court as hereinafter provided. (')

(1) See *ante*, pp. 367, 377 and 398.

The Act does not make it very clear whether the right conferred by this section is intended to be in substitution for or in addition to the right of redemption conferred by s. 60. It is submitted, however, that the latter is what is meant, and that though an usufructuary mortgagor has in the circumstances put in this section a right to recover possession of the property, he has, at the same time, a right to redeem, which he may enforce by a suit for redemption like any other mortgagor. In support of this view it may be noticed that the provisions of s. 60 are on the face of them general, there being no exception of usufructuary mortgages as in the corresponding provision (s. 67) defining the mortgagee's right to foreclosure or sale, and further that the last paragraph of s. 92, relating to decrees in redemption suits, seems distinctly to contemplate decrees in such suits being given with respect to usufructuary mortgages.

It may be noted, moreover, that the relief to which a mortgagor is entitled under this section would not seem to be as extensive as that given him in a redemption suit. In the latter case he has a right to have all documents relating to the mortgaged property delivered to him, and a retransfer of the property executed in his favour by the mortgagee, as well as delivery of possession, but in the case of a suit to enforce the right conferred by this section he is apparently entitled to possession and nothing more.

A Full Bench of the Madras High Court thus refers incidentally to cl. (a) of this section in a *Reference from the Board of Revenue under section 46 of the Indian Stamp Act 1879*.\* "The provision of the Transfer of Property Act, 62 (a) to which the Board refers, relates to a mortgage where the debt and interest subsist, and are to be paid out of the usufruct, and where the term of the mortgagee determines on the satisfaction of the debt and interest.]

### 63. Where mortgaged property in possession of the

Accession to mort- mortgagee has, during the continu-  
gaged property.      ance of the mortgage, received any  
accession, the mortgagor, upon redemption, shall, in the  
absence of a contract to the contrary, be entitled as against  
the mortgagee to such accession.

Where such accession has been acquired at the expense  
of the mortgagee, and is capable of  
Accession acquired in      separate possession or enjoyment  
virtue of transferred      without detriment to the principal  
ownership.

\* I. L. R., 7 Mad., 203 (*cf.* p. 206.)

property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended. <sup>(1)</sup>

[<sup>(1)</sup> See *ante*, pp. 284-285 ; see also the decision of the Bombay High Court in *Bakshiram Gangaram v. Darku Tukaram*\* followed in *Sadashiv Anant v. Vithal Anant*.†]

The general principles of this section are in accordance with those cases, but the detailed rules as to cases in which the accession has been acquired at the expense of the mortgagee are new. They were added by the Law Commissioners of 1879 (see p. 33 of their Report, dated 15th November 1879.)]

64. Where the mortgaged property is a lease for a term of years, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease. <sup>(1)</sup>

[<sup>(1)</sup> This section is in accordance with the English law as laid down in 1 Fisher's Law of Mortgage, 3rd ed., p. 306. When a mortgagee in possession renews a lease he may, in the absence of a contract to the contrary, add such money as he has spent in connection with the renewal to the principal money. See *infra*, p. 675, s. 72, cl (e).]

65. In the absence of a contract to the contrary, the Implied contracts by mortgagor shall be deemed to contract with the mortgagee, mortgagor.

(a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same; (<sup>1</sup>)

(b) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto; (<sup>2</sup>)

(c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property; (<sup>3</sup>)

(d) and, where the mortgaged property is a lease for a term of years, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts; (<sup>4</sup>)

(e) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance. (<sup>5</sup>)

Nothing in clause (e), or in clause (d), so far as it relates to the payment of future rent, applies in the case of an usufructuary mortgage.

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested. (°)

[(<sup>1</sup>) See *ante*, pp. 305-306.]

(<sup>2</sup>) See *ante*, p. 273.

"Enable him," *i.e.*, the mortgagee, "to defend" is rather a vague expression. It is to be presumed that it is intended that the mortgagor should do everything in his power to enable the mortgagee to defend the mortgagor's title. The mere advance of the money for the costs of defending a suit would not therefore be sufficient.

(<sup>3</sup>) See *ante*, pp. 273 *et seq.*

(<sup>4</sup>) The mortgagee is given by this clause, rights similar to those possessed by him under the covenant contained in an English mortgage-deed when the property is leasehold, (see Davidson's Precedents, Vol. II, Pt. II, pp. 819-824.)

(<sup>5</sup>) This clause seems hardly necessary. A subsequent mortgagee must, of course, take subject to prior mortgages (see *ante*, p. 641, s. 48), and it is, of course, the duty of the mortgagor to pay the interest and principal due in respect of such prior mortgages. There seems to be no advantage in declaring, as the clause does, that the mortgagor enters into an implied contract with a subsequent mortgagee to do this.

(<sup>6</sup>) See *ante*, p. 288.]

**66.** A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act. (<sup>1</sup>)

*Explanation.*—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage. (<sup>2</sup>)

[(<sup>1</sup>) See *ante*, p. 266.]

This section follows the English law. See Coote on the Law of Mortgage, 4th ed., p. 704.

(<sup>2</sup>) Compare the rule laid down in Lewin on Trusts, 5th ed., p. 263. The expediency of enacting an arbitrary rule of this nature, at any rate so far as lands in the mofussil are concerned, seems open to question.]

### *Rights and Liabilities of Mortgagee.*

67. In the absence of a contract to the contrary, (<sup>1</sup>) the mortgagee has, at any time after the Right to foreclosure or sale. mortgage money has become payable to him, (<sup>2</sup>) and before a decree has been made for the redemption of the mortgaged property; or the mortgage-money has been paid (<sup>3</sup>) or deposited as hereinafter provided, a right to obtain from the Court (<sup>4</sup>) an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold.

A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

(a) to authorize a simple mortgagee as such to institute a suit for foreclosure, or an usufructuary mortgagee as such to institute a suit for foreclosure or sale, or a mortgagee by conditional sale as such to institute a suit for sale (<sup>5</sup>); or

(b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure (<sup>6</sup>); or

(c) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; (<sup>7</sup>) or

(d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corres-

ponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage. <sup>(s)</sup>

[<sup>(1)</sup> See *ante*, pp. 409, 448 and 500.

The right to foreclosure or sale conferred by this section, may be modified or excluded by agreement between the parties. This is not so in the case of the right of redemption (compare s. 60).

<sup>(2)</sup> As to the time when the right to foreclosure or sale arises see *ante*, pp. 445-447. As in the case of redemption, [see *ante*, p. 659, s. 60, note <sup>(1)</sup>] the Act fixes the time for foreclosure or sale as "any time after the mortgage-money has become payable," as in the case of foreclosure or sale, it seems impossible to suppose that it can ever have been the intention of the parties, when fixing a date for payment of the mortgage money, that the mortgagee should have the right to demand payment before such date. The words "any time after the mortgage-money has become payable to him" must, in *this* section, be held to mean "any time after the time (if any) fixed for payment of the mortgage-money has expired." It may be noticed that in s. 60 it is the "principal-money" which is referred to. Here it is "the mortgage-money," *i.e.*, the principal money and interest, (see the definition in s. 58.) The difference does not appear to be of much practical importance.

<sup>(3)</sup> Would not a suit for foreclosure or sale be barred after the mortgage-money has been *tendered*, having regard to the fact that s. 60 gives the right to redeem "on payment or tender"?

<sup>(4)</sup> The Court is nowhere defined, but clearly means any Court having jurisdiction to entertain a suit for foreclosure or sale.

<sup>(5)</sup> The effect of the limitations upon the section made by this clause would appear to be that an English mortgagee may alone institute a suit for foreclosure or sale, a simple mortgagee, and a mortgagee by conditional sale being restricted to a suit for sale, and a suit for foreclosure respectively, whilst an usufructuary mortgagee cannot institute a suit either for foreclosure or sale. This would seem to be in accordance with the existing law, (see *ante*, pp. 441-443.)

<sup>(6)</sup> This is the rule of English law (see 1 Fisher's Law of Mortgage, 3rd edition, p. 518). It is founded on principles of equity, for to allow a mortgagor in such a case to foreclose would place him in the position of a person whose duty and interest are conflicting. It may be noted that the clause can only apply in the case of an English mortgage, for in the case of that mortgage alone has the mortgagee the alternative right of foreclosure or sale, see *supra*, cl. (a) note <sup>(5)</sup>.



(7) The Select Committee say of this clause in their first report, dated 2nd February 1878, para. 25: "We have also prohibited mortgagees from interfering with the right of the public to the continued use of undertakings, such as canals and railways, in the maintenance of which the public are interested. The remedy of such mortgagees will be to obtain a receiver of the profits of the undertaking." This is in accordance with the English practice, (see 1 Fisher's Law of Mortgage, 3rd edition, p. 329.) There is, however, no provisions in the Act stating that this is the remedy of the mortgagee in such a case.

For the appointment of a receiver see the provisions of Act XXVIII of 1866, s. 6, cl. 2 and ss. 12—18 (applicable only in the case of English mortgages) and Chapter XXXVI of the Code of Civil Procedure.

(8) See *ante* pp. 441—443.

The clause only deals with cases in which the person suing is "interested in part only of the mortgage-money." It says nothing as to cases in which the person suing is interested in the whole of the mortgage-money, but nevertheless institutes a suit relating only to a part of the mortgaged property, (see the cases cited, *ante*, p. 442).]

### 68. The mortgagee has a right to sue the mortgagor

Right to sue for mort- for the mortgage-money in the follow-  
gage money. ing cases only:—

(a) where the mortgagor binds himself to repay the same (1);

(b) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor (2);

(c) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person. (3)

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in section sixty-six, the mortgagee may require the mortgagor to give him within a

reasonable time another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money. <sup>(4)</sup>

[<sup>(1)</sup> The mortgagor must bind himself to repay the mortgage-money in the case of a "simple mortgage" and of an "English mortgage," [see the definitions, *ante*, pp. 651—652, s. 58, cls. (b) and (e)]. In England the personal liability of the mortgagor is always implied (see 1 Fisher's Law of Mortgage, 3rd ed., pp. 4—5). The effect of this clause is to exclude the personal liability of the mortgagor in all cases in which there is no express agreement to that effect, and the other clauses of the section do not apply. The clause is, therefore, of considerable importance, and should be carefully borne in mind by persons drafting mortgage-deeds.

<sup>(2)</sup> See *ante*, pp. 273, 307 & 536. See also note on the next clause.

It will be observed that this clause gives the mortgagee the right to sue for his mortgage-money, that is, presumably the *whole* of the mortgage-money, when he loses *part* only of his security through the default of the mortgagor. This seems hardly equitable. In such a case, he should only be entitled to recover a proportionate amount of the mortgage-money. See *Pitamber Misser v. Ram Surun Sookool*.\*

<sup>(3)</sup> See *ante*, pp. 306, *et seq.*, and 535-536.

The clause does not appear to save cases such as that noted, *ante* p. 310, where the parties have agreed that the mortgagee shall in any event proceed against the land only.

This and the preceding clause were noticed by the High Court, N. W. P., in the recent case of *Jhabbu Ram v. Girdhari Singh*† which was not, however, one governed by the Act. In that case an usufructuary mortgagee to whom possession of the property had been delivered, sued the mortgagor for the mortgage-money on the ground that the mortgagor had sold a part of the property, and the purchaser had deprived him of possession of such part. One of the conditions inserted in the deed of mortgage was, that if "on the part of the mortgagor, or other persons, any kind of dispute or any interference or obstruction took place in obtaining of possession by the mortgagee of the mortgaged property," the mortgagee should be entitled to sue for the mortgage-money. The Court held that the mortgagee was not entitled by virtue of the condition to sue for the mortgage-money, inasmuch as the condition contemplated only the case of the mortgagor, in the first instance, in breach of the conditions of the mortgage, failing to deliver possession to the mortgagee. In the judgment the following observations occur :—

\* 25 W. R., 7. † I. L. R. 6 All., 298, (*cf.* pp. 301, 302.)

"In other words, we hold that the clause contemplated such conditions as are described in cl. (c) of s. 68 of the Transfer of Property Act—conditions which under the long-established rule of mortgages in India, render the mortgage-money recoverable, when, in the *first instance*, the mortgagor, in breach of the conditions of the mortgage, fails to deliver possession to the mortgagee, or to secure his possession from any obstruction or disturbance even by '*any other person*,' an expression the use of which both in the covenant of the mortgage-deed and in the clause of the section is noticeable. The circumstances which the plaintiffs allege in this case as their cause of action constitute neither failure to *deliver* possession nor failure to *secure* the mortgagee in possession, but *subsequent deprivation* of possession after it has been once obtained and secured; in other words, the circumstances mentioned in cl. (b) of s. 68 of the Transfer of Property Act, from which clause the phrase "*or any other person*" is significantly absent."

As the case was not governed by the Transfer of Property Act, these remarks on the Act were extra-judicial. At the same time it may be noticed that it is doubtful whether the construction then put on cl. (c) of this section was not somewhat too narrow. There is nothing in the clause limiting it, as the judgment suggests, to cases in which the mortgagor fails to secure possession to the mortgagee in the first instance. The language of the clause is general, and seems to cover any failure to secure possession to the mortgagee *at any time* during which the mortgagee is entitled to remain in possession.

(\*) See *ante*, pp. 307-308.

This paragraph would seem to apply to cases in which the property is destroyed by diluvion, fire or other superior force. It was inserted by the Law Commissioners of 1879 (see p. 33 of their Report, dated 15th November 1879). In so far as it gives the mortgagor the option of giving the mortgagee another sufficient security for his debt instead of at once paying up the mortgage-money it appears to be new in this country.]

69. A power conferred by the mortgage-deed on the mortgagee, or any person on his behalf, to sell or concur in selling, in default of payment of the mortgage-money, the mortgaged property, or any part thereof, without the intervention of the Court, is valid in the following cases (¹) and in no others (²) (namely)—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu,

Muhammadan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Local Government, with the previous sanction of the Governor-General in Council, in the local official Gazette <sup>(3)</sup>;

(b) where the mortgagee is the Secretary of State for India in Council <sup>(4)</sup>;

(c) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karáchi or Rangoon. <sup>(5)</sup>

But no such power shall be exercised unless and until—

(1) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(2) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due. <sup>(6)</sup>

When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section fifty-seven of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred

by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof (7).

Nothing in the former part of this section applies to powers conferred before this Act comes into force.<sup>(8)</sup>

The powers and provisions contained in sections six to nineteen (both inclusive) of the Trustees and Mortgagees' Powers Act, 1866, shall be deemed to apply to English mortgages, wherever in British India the mortgaged property may be situate, when neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist, or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Local Government, with the previous sanction of the Governor-General in Council, in the local official Gazette. <sup>(9)</sup>

(1) See *ante*, pp. 139—148 for the old law.

The history of this section is as follows :—In the Bill as introduced (see s. 24) powers of sale were, subject to certain provisions for the protection of the mortgagor, declared valid in all cases. The Select Committee, to whom the Bill was first referred, disapproved of this provision and made the Bill declare (see Bill No. II, s. 39) that such powers were invalid, except where the mortgagee was the Government, or the property was situate in the Presidency towns or Rangoon. The Law Commissioners of 1879 modified this section by allowing (see Bill No. IV, s. 68) powers of sale in all cases where the principal money originally secured was five hundred rupees or upwards. Lastly, the Select Committee at first adopted the section as modified by the Law Commissioners, but finally changed their minds (see their final Report, dated 24th January 1882, para. 4), and having formed the opinion that there were certain parts of the country in which the power was liable to be abused, redrafted the section in its present shape. The remarks quoted from a Minute by Sir Charles Turner in paragraph 13 of the Statement\* of Objects and Reasons to the Bill which afterwards became Act III of 1885, will be found to throw considerable light on the object and scope of this section.

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\* Published in the *Gazette of India*, dated 23rd August 1884.

(2) These words were added by Act III of 1885, "so as to express clearly what was actually intended" (see the Statement\* of Objects and Reasons to Act III of 1885, para. 14). This they have no doubt effectually done, as in future the validity of powers of sale is distinctly limited to the cases specified in this section.

(3) The words "or a member, &c.," to the end of the clause were added by Act III of 1885, for the reason that there are other classes whom it is even more necessary to exclude from the operation of the exceptional provision in this clause than Hindus, Muhammadans and Buddhists (see the Statement\* of Objects and Reasons to Act III of 1885, para. 14.)

It is submitted, however, that this clause should not exempt any person whatever from its provisions. As pointed out in the case of *Pitamber Narayendas v. Vanmali Shamji†* (see *ante*, pp. 145-146) when parties, whoever they may be, choose to adopt the English forms of contracting, they may reasonably be supposed to have intended to contract with reference to English law.

For the persons covered by the terms "Hindu," "Muhammadan," and "Buddhist," see p. 200 of Stokes' Indian Succession Act (note on s. 331).

(4) This is a new provision. Under the old law there was no special exemption in favor of the Secretary of State.

(5) This clause merely gives effect to what is the existing law certainly in the Presidency towns of Calcutta, Madras, and Bombay, and probably also in Karáchi and Rangoon.

(6) Compare the Conveyancing and Law of Property Act, 1881, (44 and 45 Vic. c. 41) s. 20. These conditions, however, differ from those laid down in the Statute in several respects. By the Statute the notice must be notice requiring payment of the "*mortgage-money*." In the Act the "*principal money*" is substituted. The reason for this change is not apparent, especially as the first clause of this section speaks of default of payment of the "*mortgage-money*." Again, under the Statute the interest under the mortgage requires to be in arrear only for *two* months after becoming due, in order to entitle the mortgagee to exercise his power of sale. Under the Act the period is *three* months, and the interest must amount to at least five hundred rupees. The effect of this limitation apparently is that, when the interest in arrear does not amount to five hundred rupees, a notice in writing is always required. Lastly, the Statute gives a third case, in which the power of sale may be exercised, namely, when there has been a breach of some condition other than and besides a covenant for the payment of the mortgage-money. Such a case is not provided for by the Act.

\* Published in the *Gazette of India*, dated 23rd August 1884.

† I. L. R., 2. Bom. 1.

(<sup>7</sup>) The next two paragraphs, as to the rights of purchasers under powers of sale and disposal of proceeds of sale are taken *verbatim* from s. 21, clauses (2) and (3) of 44 and 45 Vic. c. 41. The words "in the absence of a contract to the contrary" do not occur in clause (3) of s. 21 of the Statute, but are in accordance with the provisions of s. 19, clauses (2) and (3) thereof. It is noticeable that none of the other clauses of s. 21 of the Statute are adopted in the Act.

(<sup>8</sup>) Compare s. 21, clause (4) of 44 and 45 Vic. c. 41.

It seems questionable whether this provision is required with reference to the saving in s. 2, cl. (c) (see *ante*, p. 612).

(<sup>9</sup>) The words "or a member etc.," to the end of the section were added by Act III of 1885, (see *supra*, p. 673 note (<sup>5</sup>)).

The sections of Act XXVIII of 1866, to which this clause refers, are set out in App. A. *post*, p. 729.

With regard to this clause the Select Committee say in their final report: "We have taken the opportunity to declare the applicability of ss. 6—19 of Act No. XXVIII of 1866, respecting which some doubt exists." Though the mortgages to which those sections of Act XXVIII of 1866 are declared to apply, are mortgages to which this section is also applicable, the provisions in Act XXVIII of 1866, relating to the exercise of powers of sale differ, it will be seen, very materially from those contained in this section. The provisions of Act XXVIII of 1866 would seem, however, to be applicable only to cases in which the deed does not confer any express power of sale, while this section on the contrary is confined to cases in which the deed does confer such a power (see the first clause of this section). If there be this distinction, then there is no *conflict* between the provisions of Act XXVIII of 1866, and this section. At the same time the anomaly remains that when an English mortgage contains no express power of sale, one set of rules, namely, those laid down by Act XXVIII of 1866, is applicable to the exercise of a power of sale, while if the mortgage does contain an express power of sale, the exercise of the power is governed by another set of rules, namely those contained in this section.]

70. If, after the date of a mortgage, any accession is

Accession to mort- made to the mortgaged property, the  
gaged property. mortgagee, in the absence of a contract  
to the contrary, shall, for the purposes of the security, be  
entitled to such accession. (<sup>1</sup>)

#### *Illustrations.*

(a). A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, B is entitled to the increase.



(b). A mortgages a certain plot of building land to B and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot.

[(<sup>1</sup>) See *ante*, pp. 284-285; see also for the English law, 1 Fisher's Law of Mortgage, 3rd ed., p. 305. Compare also *ante*, s. 63, for the rights of the mortgagor when the security comes to an end.]

71. When the mortgaged property is a lease for a term of years, and the mortgagee obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease. (<sup>1</sup>)

[(<sup>1</sup>) For the English law, see 1 Fisher's Law of Mortgage, 3rd ed., pp. 305-306, and compare *ante*, s. 64 for the rights of the mortgagor on redemption.]

72. When, during the continuance of the mortgage, (<sup>1</sup>) the mortgagee takes possession of the mortgaged property, he may (<sup>2</sup>) spend such money as is necessary—

(a) for the due management of the property and the collection of the rents and profits thereof; (<sup>3</sup>)

(b) for its preservation from destruction, forfeiture or sale; (<sup>4</sup>)

(c) for supporting the mortgagor's title to the property; (<sup>5</sup>)

(d) for making his own title thereto good against the mortgagor (<sup>6</sup>); and

(e) when the mortgaged property is a renewable leasehold, for the renewal of the lease; (<sup>7</sup>)

and may, in the absence of a contract to the contrary, add such money to the principal-money, at the rate of interest payable on the principal, and where no such rate is fixed at the rate of nine per cent. per annum.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the

contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the same rate. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured. (\*)

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure. (°)

[(1) The cases to which this section is applicable are those in which "during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property." It is presumed that these words are intended to cover usufructuary mortgages, though in the case of those mortgages, the mortgagee takes possession, strictly speaking, before the mortgage commences rather than during its continuance, for until the mortgagee gets possession there can be no usufructuary mortgage [see the definition in s. 58, cl. (d).]

(2) It will be observed that this section only defines the *rights* of the mortgagee, who is in no way *bound* under this section to spend money on any of the objects enumerated in it.

(3) See *ante*, pp. 571-572.

(4) See *ante*, pp. 273-274, 278, and 572-573.

Under the English law (see 2 Fisher's Law of Mortgage, 3rd ed., pp. 950 *et seq.*) an allowance will not ordinarily be made to a mortgagee for improvements, unless they were necessary for the preservation of the estate, or were made with the sanction of the mortgagor. This clause would seem to be in accordance with that law, for the section only states the cases in which the mortgagee has a right, apart from any sanction given by the mortgagor, to spend money on the estate. There is nothing either in the section or in the Act to prevent an allowance being made to the mortgagee for improvements, even though they did not preserve the property from destruction, if made with the sanction of the mortgagor.

(5) Compare 2 Fisher's Law of Mortgage, 3rd ed., pp. 945-946.

(6) Compare 2 Fisher's Law of Mortgage, 3rd ed., p. 946.

(7) Compare 2 Fisher's Law of Mortgage, 3rd ed., p. 945.

(8) These provisions as to insurance are new at any rate so far as mofussil mortgages are concerned. They are apparently taken from the Conveyancing and Law of Property Act 1881, Statute (44 & 45 Vic. c. 41) s. 19, cl. (ii) and s. 23, cls. (1) & (2) (iii).

It is to be presumed that these provisions are restricted to cases in which the mortgagee has taken possession of the mortgaged property. This may perhaps be inferred from the use of the word "also," but the point is not as clearly brought out as it might be.

(9) There seems to be nothing here or elsewhere in the Act of the nature of that contained in 44 and 45 Vic. c. 41, s. 23, cl. (3) requiring a mortgagor, who keeps up an insurance, to apply the money to re-instating the property or reducing or discharging the mortgage. Section 49 is confined to cases in which the property is insured *at the date of the mortgage*, while s. 76 cl. (f) merely prescribes the duty of the mortgagee in this respect. The point does not seem to be of much importance as the mortgagor would only usually keep up an insurance of the property by special agreement with the mortgagee, in which case the mortgage-deed would contain a provision as to the application of the insurance money (see for example, 2 Davidson's Precedents, 2nd ed., Pt. II, p. 784). The provisions of section 23, clause (3) of 44 and 45 Vic. c. 41, seem to make it unnecessary for English mortgage-deeds now to contain any such provision (see the forms given in 2 Prieaux, pp. 517 and 520.)]

### 73. Where mortgaged property is sold through failure

Charge on proceeds of to pay arrears of revenue or rent due  
revenue-sale. in respect thereof, the mortgagee has  
a charge on the surplus, if any, of the proceeds, after  
payment thereof of the said arrears, for the amount  
remaining due on the mortgage, unless the sale has been  
occasioned by some default on his part. (1)

[(1) See *ante* pp. 273-274 and 538.

This section would appear to be in accordance with the existing general revenue law in the three Presidencies, and with the law in Bengal relating to patni-tenures and other tenures and under-tenures which are liable to be sold for arrears of rent, free of all incumbrances, such for example as are covered by s. 66 of Act VIII (B.C.) of 1869.

It seems doubtful, however, whether it would have any application to a case in which an estate is sold for arrears of revenue due by a co-owner where a separate registration has been effected,

under the provisions of s. 11 of Act XI of 1859, or where a tenure or under-tenure is sold for arrears of rent, where such sales are subject to any incumbrance existing at the date thereof (see for example, *Shahaboodeen v. Futteh Ali\**), or whether it fits in with the rent law in Madras, where it has recently been held that a sale by a landlord of a tenant's interest in his holding for non-payment of rent under the provisions of the Rent Recovery Act (Mad. Act VIII of 1865) does not defeat existing incumbrances (see *Rayagopalachari v. Subbaraya Mudali†*).

In such cases if this section has any application the mortgagee would apparently have the option of going against the surplus sale proceeds as well as of following the land in the hands of the purchaser—a result which the legislature can hardly have intended. It is possible, therefore, that a Court of law in construing this section might hold that it has no application to cases when a sale takes place subject to existing incumbrances upon the ground that the “mortgaged property” is not then sold, but only the right, title and interest, or in other words the equity of redemption of the mortgagor, and though the section has not as yet been the subject of a judicial decision, this would appear to be a reasonable construction to put upon it.]

**74.** Any second or other subsequent mortgagee may <sup>(1)</sup>, at any time <sup>(2)</sup> after the amount due on the next prior mortgage <sup>(3)</sup> has become payable, tender such amount to the next prior mortgagee <sup>(4)</sup>, and such mortgagee is bound to accept such tender and to give a receipt for such amount <sup>(5)</sup>; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he had made such tender.

[(<sup>1</sup>) See *ante*, pp. 318, 334.]

The procedure prescribed by the provisions of this section are new. They are based on certain proposals made by the Law Commissioners (see their Sixth Report, dated 28th May 1870, p. 12.)

(<sup>2</sup>) No notice is contemplated in any case, but compare s. 60 *ante*, p. 658, as to notice before payment or tender by the mortgagor.

\* 7 W. R. 260 (F. B.)

† I. L. R. 7 Mad. 31 (F. B.) and see *ante*, p. 274 note (x).

(3) Though a subsequent incumbrancer may apparently *redeem* any prior mortgagee (see s. 75) he can pay off according to the procedure prescribed by this section only "the amount due on the next prior mortgage."

(4) That is, the amount due on the next prior mortgage. If he tenders less than this, the prior mortgagee would not seemingly be bound to accept the tender. In some cases, however, it would be impossible for the subsequent mortgagee to ascertain this amount without an adjustment of accounts, but for this no provision is made.

(5) The section does not state what the remedy of the subsequent mortgagee is, if the prior mortgagee refuses to accept the tender or to give a receipt. But he would apparently, under the provisions of the following section, be entitled to bring a suit for redemption (see *ante* s. 60 and *post* s. 91.)]

**75.** Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor. (1)

[<sup>(1)</sup> See *ante* p. 334. This section gives legislative expression to the old rule "redeem up, foreclose down," see also *post*, p. 692; note (2) on section 86, as to the form of decree where subsequent incumbrancers are made parties.]

**76.** When during the continuance of the mortgage (1), the mortgagee takes possession of the mortgaged property,—

(a) he must manage the property as a person of ordinary prudence would manage it if it were his own ; ( )

(b) he must use his best endeavours to collect the rents and profits thereof ; (3)

(c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government-revenue, all other charges of a public nature accruing due in respect thereof during such possession and any arrears

of rent in default of payment of which the property may be summarily sold ; (4)

(d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money ; (5)

(e) he must not commit any act which is destructive or permanently injurious to the property ; (6)

(f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money ; (7)

(g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported ; (8)

(h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage-money, and so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money, the surplus, if any, shall be paid to the mortgagor ; (9)

(i) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on

the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his gross receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be. (10)

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure. (11)

Loss occasioned by his default.

[(1) For the effect of the words "during the continuance of the mortgage," see *ante*, p. 676, s. 72, note (1).

(2) See *ante*, pp. 266 and 282, and compare 2 Fisher's Law of Mortgage, 3rd ed., p. 948.

In a case decided by the Bombay High Court (*Girjoji B. Sonar v. Keshavrao N. P. Hinge*\*), it was held that a mortgagee in possession was bound to cultivate the best crop which the land was ordinarily capable of yielding; for the phrase "person of ordinary prudence," see s. 151 of the Indian Contract Act, 1882.

(3) See *ante*, p. 283; and compare 2 Fisher's Law of Mortgage, 3rd ed., pp. 935 and 943, and the remarks of *Jessel*, M. R., in *Mayer v. Murray*.†

(4) See *ante* pp. 273, *et seq.*, 283 and 573, and the remarks on this clause by *Mahmood*, J., in *Jaigrit Rai v. Gobind Tiwari*.‡

It is not quite clear what the words "all other charges of a public nature" cover. Such allowances, as *malikana* and *haqq*s of chowkidars and putwarees are, it is believed in many cases, not fixed by the Government, and do not seem therefore to come naturally under the classification of charges of a *public nature*. The mortgagee in possession should, however, be certainly bound to pay them.

As the clause stands the words "accruing due in respect thereof during such possession" would seem only to govern the immediately preceding words, "other charges of a public nature." They should, however, also govern the words "the Government revenue," and it is apparent from the earlier drafts of the Bill that they were intended to do so.

\* 2 Bom. H. C. 222.

† L. R. 8 Ch. D. 424, (*cf.* pp. 427, 428.)

‡ I. L. R. 6 All. 303 (*cf.* p. 309.)



The last words of the clause were added to meet the case of *patni tenures* and *saleable under-tenures*. (See further report of the Select Committee, dated 19th February 1879, para. 25.) This clause is described by *Mahmood, J.*, in a recent case—*Jaijit Rai v. Gobind Tiwari*,\*—as formulating a rule of law well recognized by the Courts.

It may be observed that neither in this clause nor elsewhere in the Act is there any provision prescribing the liability of a mortgagee of leasehold property who is in possession to pay the rent. This omission has been noted by *Garth, C.J.*, in *Kannye Loll Sett v. Nistoriny Dossee†* (referred to *ante*, p. 283.)

(5) See *ante*, p. 282, and compare 2 Fisher's Law of Mortgage, 3rd ed., p. 948.

The subject of this clause is probably covered also by cl. (a) of this section. It is presumed that the "rents and profits" referred to in this clause are the same as the income referred to in cl. (a). It is not apparent why a different expression is used. "The principal money" referred to at the end of the clause must mean "the principal money of which payment is secured for the time being." [See the definition of mortgage-money, *ante* s. 58, cl. (a).]

(6) See *ante*, pp. 282-283.

(7) Compare the provisions of the Conveyancing and Law of Property Act, 1881, (44 and 45 Vic. c. 41) s. 23, clauses (3) and (4), and see *ante*, p. 677, s. 72 note (9).

(8) See *ante*, pp. 283-284 and Chap. X generally.

It will be observed that the mortgagee is only obliged to keep accounts of sums received and spent by him "as mortgagee." This is in accordance with the existing law, (see *ante*, pp. 549-550 and 561).

The provision in this clause requires the mortgagee "at any time during the continuance of the mortgage" to give the mortgagor copies of the accounts. It would thus apparently empower the mortgagor to require the accounts to be produced even when he had no intention of redeeming.

(9) See *ante*, Chap. X generally, and especially pp. 551, 569-573, and the remarks on this clause by *Mahmood, J.*, in *Jaijit Rai v. Gobind Tiwari*.\*

In reading this clause the provisions of s. 72 must not be overlooked. Though the payments referred to in cls. (c) and (d) of this section, namely, those on account of the Government revenue and other public or semi-public charges, the interest on the principal money secured, and necessary repairs are the

\* I. L. R. 6, All., 303 (cf. p. 309.) † I. L. R. 10 Calc. 443.

only ones which are to be taken into account when calculating the amount of the mortgagee's receipts, the payments referred to in s. 72 are to be taken into account when calculating the amount of the principal money secured under the mortgage. At the same time there is a practical difference between payments made by the mortgagee under this section, and those made under s. 72. The former he is entitled to have repaid to him before any receipts are carried to his debit, whilst he has to wait for the repayment of the latter until the principal money is repaid.

The word "receipts" in this clause must, it is presumed, be treated as equivalent to the "income" referred to clause (c), and the "rents and profits" mentioned in clause (d).

The provision in this clause that the receipts referred to are, after deducting the expenses mentioned in clauses (c) and (d), to be debited first to the amount due to the mortgagee "on account of interest on the mortgage-money," would appear to be inconsistent with clause (d). For under that clause the expenses mentioned in it are not to be paid until after the interest on the principal money has been paid. So that, if any expenses have been paid under clause (d) there should be no interest remaining due to be paid under this clause.

The references to "mortgage-money," made in this clause, would seem to be inaccurate. They ought to be to "the principal money." [See the definition of "mortgage-money" in s. 58, clause (a).]

It may be noted lastly that the whole clause seems rather out of place in this section.

(10) See *ante*, p. 374.

It is to be observed that under this clause the mortgagee must account for his "gross receipts." Compare the provisions of clause (h.)

(11) See *ante*, pp. 275, 282-283, 571 and 573-575, and the remarks on this clause by *Mahmood, J.*, in *Jaijit Rai v. Gobind Tiwari*.\*

**77.** Nothing in section seventy-six, clauses (b), (d), (g) and (h), applies to cases where there

Receipts in lieu of interest.

is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest

\* I. L. R. 6 All, 303 (*cf.* p. 310.)

on the principal money, or in lieu of such interest and defined portions of the principal. <sup>(1)</sup>

[<sup>(1)</sup> See *ante*, pp. 389—391, 549 and 561, as to the mortgagee not being required to account when there is a contract of the nature referred to in this section. The provision that in such cases he is not bound to collect the rents and profits or repair [see s. 76, clauses (b) and (d)] is new and was added by the Indian Law Commissioners (see their Report, dated 15th November 1879, p. 34).]

### *Priority.*

78. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee. <sup>(1)</sup>

Postponement of  
prior mortgagee.

[<sup>(1)</sup> See *ante*, p. 291, and compare 2 Fisher's Law of Mortgage, 3rd ed., pp. 877—878.]

The ordinary rule as to priority is laid down *ante*, p. 641, s. 48.

The object of this section is to apply the doctrine laid down by Lord Denman in *Pickard v. Sears*\* (see Select Committee's Report, dated 2nd February 1878, para. 34). It seems doubtful, however, whether with reference to s. 115 of the Indian Evidence Act the section was really required.

The words "fraud" and "misrepresentation" are defined in ss. 17 and 18 of the Contract Act of which this Act is to be taken as part. The phrase "gross neglect" is not unlikely to give rise to difficulties. Thus it might be contended that a prior mortgagee, who neglects to take possession of the title-deeds, and thus enables the mortgagor to make a second mortgage of the property, is guilty of "gross neglect" within the meaning of the section. If so the effect of the section will be to require the mortgagee to get possession of the title-deeds at any rate in every case in which he does not get possession of the property.]

79. If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall,

Mortgage to secure  
uncertain amount when  
maximum is expressed.

if made with notice (¹) of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage. (²)

### *Illustration.*

A mortgages Sultánpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultánpur to C, to secure Rs. 10,000, C having notice of the mortgage to B & Co., and C gives notice to B & Co. of the second mortgage. At the date of the second mortgage, the balance due to B & Co. does not exceed Rs. 5,000. B & Co. subsequently advance to A sums making the balance of the account against him exceed the sum of Rs. 10,000. B & Co. are entitled, to the extent of Rs. 10,000, to priority over C.

[ (¹). As to "notice" see the definition, *ante*, p. 616, s. 3.

(²). This section is opposed to the present English law, under which, "although a mortgage is expressly made to secure the sum then lent and also further advances, and although the second mortgage is made to another person with notice of the first, yet if the further advances are made by the first mortgagee, with notice of the second, the first mortgagee *cannot* tack such advances against the second." See Coote on Mortgages, 3rd ed., p. 826. See also 2 Fisher's Law of Mortgage, 3rd ed., p. 613, for the objections to the doctrine laid down in this section, which was, however, adopted on the ground that it was "more just" by the Law Commissioners. (See their Sixth Report, dated 20th May 1870, p. 12.)

The section, as originally drawn, was restricted to mortgages made to secure running accounts. It was extended to mortgages to secure further advances, and the performance of engagements by the Law Commissioners of 1879. (See p. 34 of their Report, dated 15th November 1879). As the mortgage must express "the maximum to be secured thereby," it would seem that the section is inapplicable when the mortgage is given to secure a general balance of a floating account, without any maximum amount being fixed. In such a case the further advances made by the first mortgagee would apparently be postponed to the second mortgage, (see *infra*, s. 80).]

80. No mortgagee paying off a prior mortgage, whether

with or without notice (¹) of an inter-  
mediate mortgage, shall thereby  
Tacking abolished.  
acquire any priority in respect of his original security.  
And, except in the case provided for by section seventy-

nine, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance. <sup>(2)</sup>

[(<sup>1</sup>) As to notice see the definition *ante*, p. 616, s. 3.]

(<sup>2</sup>) See *ante*, pp. 319-320.

This provision was introduced by the Law Commissioners (see their Sixth Report, dated 28th May 1870, p. 12.) As pointed out by them the system of "tacking" is based wholly on technical grounds, and might almost be expected to fall of itself when the distinction between legal and equitable estates is abolished. So far as the *mofussil* is concerned, the section can hardly be said as stated in the marginal note to *abolish* tacking, seeing that tacking as described in this section has apparently never been recognized there.]

### *Marshalling and Contribution.\**

81. If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice (<sup>1</sup>) of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property. (<sup>2</sup>)

[(<sup>1</sup>) As to notice see the definition, *ante*, p. 616, s. 3.]

(<sup>2</sup>) See *ante*, pp. 326 and 491-492; and compare 2 Fisher's Law of Mortgage, 3rd ed., pp. 704, *et seq.* See also Coote on Mortgages, 4th ed., chap. LXXVI.

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\* "These rights act reciprocally, and rest upon the principle that a fund, which is equally liable with another to pay the debt, shall not escape because the creditor has been paid out of that other fund alone; and on the other hand, that a creditor, who has the means of satisfying his debt out of several funds, shall so exercise his right as not to take from another creditor or claimant the fund which forms his only security." (2 Fisher's Law of Mortgage, 3rd ed., p. 699). The application of these doctrines in the case of *mofussil* mortgages is new.

In this section the word "debt" would seem to be used for "mortgage-money." (See *infra* note <sup>(1)</sup> on s. 82).]

82. Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

Contribution to mortgage-debt.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section eighty-one to the claim of the second mortgagee. (1)

[(1) See *ante*, p. 465, and compare 2 Fisher's Law of Mortgage, 3rd ed., pp. 700 *et seq.*

It seems questionable whether the last clause of this section does not go too far. Under it, if estates X and Y be mortgaged, first to A, and secondly X be mortgaged to B, and thirdly Y to C (which is a case put at p. 705 of Fisher), as the estates X and Y are liable to the claim of the second mortgagee, there cannot, under the last clause of this section, be any contribution. Moreover B cannot enforce the doctrine of marshalling, as by doing so he would prejudice the rights of C, who is a person having acquired for valuable consideration an interest in property Y (see the last words of s. 81). A, the first mortgagee, would seem, therefore, to be entitled under the Act to satisfy his debt, out of either or both of the mortgaged properties, as he thinks fit without any reference to the doctrine either of marshalling or contribution. In such a case, however, under English law "the Court will throw the debt of A upon both his securities, rateably according to their value and so will leave the residue of each to satisfy

the subsequent incumbrancer, to whom it was specifically mortgaged." (See 2 Fisher's Law of Mortgage, 3rd ed., p. 706.)

In this section also the word "debt" would appear to be intended to mean generally the amount secured under a mortgage, and to have the restricted sense assigned to it in the definition of "mortgage money" (see *ante*, s. 58).]

### *Deposit in Court.*

83. At any time after the principal money has become

payable and before a suit for redemption of the mortgaged property is  
Power to deposit in Court money due on mortgage.

barred <sup>(1)</sup>, the mortgagor, or any other person entitled to institute such suit, <sup>(2)</sup> may deposit, in any Court in which he might have instituted such suit <sup>(3)</sup>, to the account of the mortgagee, the amount remaining due on the mortgage.

The Court shall thereupon cause written notice of the

deposit to be served on the mortgagee, and the mortgagee may, on presenting  
Right to money deposited by mortgagor.

a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed if then in his possession or power, apply for and receive the money, and the mortgage-deed so deposited shall be delivered to the mortgagor or such other person as aforesaid <sup>(4)</sup>.

[(<sup>1</sup>) "A suit for redemption of the mortgaged property is barred" when the right of redemption has been extinguished by act of the parties, or by order of a Court, (see *ante*, p. 658, s. 60, proviso).]

(<sup>2</sup>) For the persons who are entitled to institute a suit for redemption, see *post*, pp. 699-700, s. 91.

(<sup>3</sup>) For the Court in which a suit for redemption may be instituted, see *ante*, pp. 374, 375.

(<sup>4</sup>) See *ante*, pp. 392, *et seq.*



This section follows generally the provisions as to payment into Court contained in Bengal Regulation I of 1798, which it extends to all mortgages.

Having regard, however, to the fact that the Act gives time for redemption after a decree for foreclosure or sale has been obtained, (see *infra*, s. 86, *et seq*) the necessity for the retention of a provision of this nature may, it is submitted, well be questioned. When Bengal Regulation I of 1798 was passed, mortgages by conditional sale became absolute and irredeemable if the mortgage-money was not paid within the stipulated period, and though by Bengal Regulation XVII of 1806, it was provided that the mortgagee should give the mortgagor through the Civil Court one year's notice of foreclosure, and that the estate should be redeemed by the mortgagor within that year, instead of within the stipulated period, depositing the amount due in the Court as allowed by Bengal Regulation I of 1798, still once a foreclosure suit was filed, the mortgagor's right of redemption was at an end. It was to guard against the mortgagor's rights being improperly foreclosed that the provisions of Bengal Regulation I of 1798 were enacted, but this can never occur under the provisions of the Act, as the mortgagor always has under them an opportunity of redeeming after a decree for foreclosure or sale has been made. As it stands the section confers on mortgagors the exceptional privilege, which other debtors do not enjoy, of paying the amount of their debt into Court, even when their creditor has not brought any suit against them.

It may be noted that the section in allowing the money to be deposited in any Court in which the mortgagor might have instituted a suit for redemption, differs from the Regulation under which the deposit had to be made in the Civil Court of the district in which the land was situated.]

84. When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section eighty-three the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be <sup>(1)</sup>.

Nothing in this section or in section eighty-three shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to

reasonable notice before payment or tender of the mortgage-money (\*).

[(<sup>1</sup>) See *ante*, pp. 374 and 391 as to cessation of interest upon tender. The same principle would appear to be applicable in the case of a deposit in Court.]

It will be observed that in order to get the benefit of this section the mortgagor must have deposited "the amount remaining due on the mortgage." Should it, therefore, be found in a subsequent suit that the amount deposited by the mortgagor was not the actual amount due on the mortgage, though it was what he believed to be the amount, the mortgagor, will, it would seem, lose the benefit of this section even in respect of the money he has deposited. A mortgagor has apparently "done all that has to be done by him to enable the mortgagee to take such amount" (that is the amount deposited) "out of Court," when he has deposited the money in Court (see *ante*, s. 83). It does not seem clear why the section does not say this directly.

It may not be out of place to notice here that the Bill in its earlier stages contained provisions to the effect that where there was a contract between the parties as to the rate of interest, interest should be payable in accordance with such contract, and that where there was no such contract, the mortgagee should be entitled to interest at 6 per cent. This provision was, however, omitted from the Bill without any reason being assigned by the Law Commissioners of 1879, and the Select Committee never subsequently restored it. In the absence of any special provisions in the Act on this subject, questions as to the rate of interest will continue in future to be governed by the existing law as to which see *ante*, pp. 148 *et seq.*, and 550 *et seq.*

(<sup>2</sup>) See *ante*, p. 659, s. 60 note (<sup>4</sup>) ]

### *Suits for Foreclosure, Sale or Redemption.*

85. Subject to the provisions of the Code of Civil Procedure, section 437 (<sup>1</sup>), all persons

Parties to suits for foreclosure, sale and redemption.

having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage (<sup>2</sup>): Provided that the plaintiff has notice (<sup>3</sup>) of such interest.

[(<sup>1</sup>) The provisions of s. 437 of the Code of Civil Procedure to which this section is declared to be subject are to the effect that in suits concerning property vested in a trustee, executor or

administrator when the contention is between the persons beneficially interested in such property, and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. This is similar to the rule laid down by 15 and 16 Vic. c. 86, s. 42, as to which see 2 Fisher's Law of Mortgage, 3rd ed., pp. 907, *et seq.*, and Coote on Mortgages, 3rd edition, pp. 1073-74.

(2) See *ante*, pp. 344, 441 and 449—457.

The rule laid down by this section is the same as that under English law, which is that all persons who have an interest either in the right of redemption, or in the security, must be joined in a suit relating to incumbered property, though the result may be the trial of a legal right between parties thus brought before the Court for a different purpose. (See 2 Fisher's Law of Mortgage, 3rd edition, p. 883). As under the definition of mortgage contained in the Act, both persons interested in the right of redemption and in the security have an interest in the property, the section covers all the cases to which the English rule extends. The effect of this section apparently is that if any persons of whom the plaintiff has notice, and who should be joined as parties, are not so joined, the suit is bad.

(3) As to notice see the definition contained in section 3, *ante*, p. 616.]

### *Foreclosure and Sale.*

86. In a suit for foreclosure (1), if the plaintiff succeeds, the Court (2) shall make a decree (3), ordering that an account be taken (4) of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree (5),

and ordering that, upon the defendant paying to the plaintiff or into Court (6) the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, (7) the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the

Decree in foreclosure-suit.

defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property; but

that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.

[(<sup>1</sup>) For the nature of the right to foreclosure, see *ante*, p. 666, s. 67, first paragraph. As only mortgagees by conditional sale and English mortgagees may sue for foreclosure [see *ante*, p. 667 note (<sup>5</sup>)] this section is only applicable in the case of those mortgages. So far as English mortgages, and mortgages by conditional sale in places in which the Bengal Regulations were not in force, are concerned, the section prescribes a foreclosure somewhat similar to the old one (see *ante*, pp. 544, 545 for mortgages by conditional sale). But in the case of mortgages by conditional sale in places in which the Bengal Regulations were in force, the foreclosure prescribed by the section is entirely new (*cf. ante*, pp. 500, *et seq.*)]

(<sup>2</sup>) For the Court in which a suit on a mortgage may be brought, see *ante*, pp. 437, *et seq.*

(<sup>3</sup>) The form of decree set out in this section follows the common form in use in England (see Seton on Decrees, 4th ed., p. 1035) where there is a single mortgagor and mortgagee. The Act as passed\* makes no provision for decrees in suits to which subsequent incumbrancers are parties where there must be successive redemptions and foreclosures (see Seton on Decrees, 4th ed., pp. 1081 *et seq.*, and 2 Fisher's Law of Mortgage, 3rd ed., pp. 1038 *et seq.*), though it clearly contemplates the possibility of such suits (see *ante*, s. 85). It is clear that the Act is in this respect defective, and that if the Courts were to rigidly adhere to the form of decree contemplated by this section, they could not do justice between the parties. The High Court at Calcutta has accordingly in recent cases departed from the strict letter of the section and given decrees, by which it has endeavoured, without contravening any provision in the Act, to deal with the rights of all parties to the suit.

Thus in a recent case† where a first mortgagee sued the mortgagor and a second mortgagee, the Court gave a decree under

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\* The Bill in its second stage did provide for the point, but the provision, together with a form of decree which was set out in the schedule, were subsequently cut out by the Select Committee. (See their Report, dated 19th February 1879, para 27.)

† Unreported. I am indebted to Mr. R. Belchambers, the Registrar of the High Court, Original Side, for a copy of the decree in the case.

which the mortgagor was allowed six months to redeem both mortgages, and in default the property was to be sold, and the proceeds paid first in satisfaction of the first mortgage, and then in satisfaction of the second mortgage. Under the old form of decree in such a suit the second mortgagee would have been given a prior right to redeem the first mortgage, and in default he would have been foreclosed of this right. This right is not conferred by the form of decree above stated, inasmuch as the terms of the Act do not provide for successive redemptions. At the same time the second mortgagee does not appear to suffer any material disadvantages by a decree in the new form, as, though under it, he is not entitled to redeem the first mortgage, he does not lose his right to participate in the proceeds of the sale of the property and thus recover his mortgage-money.

(4) The section does not prescribe the method in which the account is to be taken, and the items which are to be allowed or disallowed, but, of course, the provisions of ss. 63, 72 and 76 must be observed in cases where the mortgagee has had possession.

(5) The last words of this para. give the Court the option of taking accounts itself at once. This provision will probably be made use of largely in the Mofussil Courts, where there is no subordinate ministerial agency, as in the case of the High Court, for taking accounts. It is, moreover, in accordance with existing practice in provinces in which the Bombay Regulations were not in force [see *ante*, p. 545, note (v).]

(6) When the amount found due is paid direct to the plaintiff, no further direction as to the money is, of course, necessary; but when the mortgagor pays the money into Court the decree should, it is submitted, contain a direction that the proper officer shall pay out to the plaintiff the amount so paid in (*cf.* the direction in the Form No. 128 of the Fourth Schedule to the Code of Civil Procedure which, though a Form of decree for sale, is on this point identical with a decree for foreclosure.)

It may also be noted that when the money is to be paid direct to the plaintiff by the mortgagor it is usual to fix a time and place for the payment (see Seton on Decrees, 4th ed., p. 1035).

(7) The effect of these words is that, in ordinary cases, the mortgagor cannot have more than six months, and may have any less time which the Court chooses to fix, from the time when the accounts are taken, to redeem the mortgage. It will be observed that this provision materially shortens the time allowed for payment under Bombay Regulation XVII of 1806, which is one year from the date of service on the mortgagor of the Judge's notice (see *ante*, p. 509.)

In England the practice is to give a period of six months from the date when the amount due is certified to the party first entitled to redeem, and three months each to the succeeding ones (see 2 Fisher's Law of Mortgage, 3rd ed., pp. 1048-1049, and Seton on Decrees, 4th ed., p. 1085.)]

87. If payment is made of such amount and of such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put into possession of the mortgaged property <sup>(1)</sup>.

Procedure in case of  
payment of amount due.

If such payment is not so made, the plaintiff may apply to the Court for an order that the defendant, and all persons claiming through or under him, be debarred absolutely of all right to redeem the mortgaged property, and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff <sup>(2)</sup>.

Provided that the Court may, upon good cause shewn, and upon such terms, if any, as it thinks fit, from time to time postpone the day appointed for such payment. <sup>(3)</sup>

Power to enlarge time.

On the passing of an order under the second paragraph of this section, the debt secured by the mortgage shall be deemed to be discharged.

In the Code of Civil Procedure, Schedule IV, No. 129, for the words "Final decree," the words "Decree absolute" shall be substituted <sup>(4)</sup>.

[(1) See *ante*, p. 500.

The clause merely says that the defendant shall on payment be put into possession. He is, however, clearly entitled under the decree (see s. 86) to delivery of the title-deeds and a formal transfer of the property. The subsequent costs in a case of this nature must be the costs connected with obtaining possession and the execution of the transfer. Possibly also the costs of taking the account. The costs of the suit, if any, awarded to the plaintiff are to be included in the account taken under the decree.

(<sup>2</sup>) Compare the final order for foreclosure in Seton on Decrees, 4th ed., p. 1089.

(<sup>3</sup>) The proviso was inserted by the Select Committee who remarked (see para. 37 of their Report, dated 2nd February 1878) that the power conferred by it was one which was constantly exercised by Courts of Equity, and was one which they believed would be in accordance with the feelings of the people of many parts of India, where, until recently, the power to redeem was held to last for ever, and even the long term of sixty years fixed by the Limitation Act was sometimes regarded as an unfair innovation. The word "upon such terms" were added by the Law Commissioners of 1879 who said (see p. 34 of their Report, dated 15th November 1879) that they thought the Court should not postpone the day appointed for payment in a foreclosure suit, unless sufficient security was given as well as good cause shown.

Though this proviso confers on the Court an unlimited power of enlarging the time for payment, it is to be noted that the Act gives no power to open a foreclosure when once an order absolute has been passed, such as an English Court possesses (see the form in Seton on Decrees, 4th ed., p. 1087.) It would seem from para. 38 of the Select Committee's Report, dated 2nd February 1878, that this power was designedly withheld.

(<sup>4</sup>) The amendment of the heading of Form No. 129 of Schedule IV of the Code of Civil Procedure, made by this paragraph seems hardly correct. This Act nowhere refers to a "*decree absolute*," though the second paragraph of this section provides for the passing by the Court of an *order* that the defendant be debarred absolutely of all right to redeem the property. If any amendment of the heading of the form appended to the Code was necessary, it should, it is submitted, have substituted the words "*order absolute*" for "*decree final*." In England also it may be observed a foreclosure is made "*final*," *i.e.*, absolute by an order, and not a decree. (See Seton on Decrees, 4th ed., p. 1089).]

88. In a suit for sale (<sup>1</sup>), if the plaintiff succeeds, the Court (<sup>2</sup>) shall pass a decree to the effect mentioned in the first and second paragraphs of section eighty-six (<sup>3</sup>), and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in pay-

Decree for sale.



ment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same <sup>(4)</sup>).

In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms <sup>(5)</sup>).

[<sup>(1)</sup> For the nature of the right to sale, see *ante*, p. 666, s. 67, first paragraph.

As simple mortgagees and English mortgagees can alone institute a suit for sale [see *ante*, s. 67, cl. (a)] this section is, of course, limited to these mortgages.

<sup>(2)</sup> For the Court in which a suit for sale of mortgaged property may be brought, see *ante*, pp. 437 *et seq.*

<sup>(3)</sup> See *ante*, pp. 692-693, the notes on those paragraphs of s. 86.

It may, however, be added to what is there said that the Form No. 128 in the fourth schedule to the Code contemplates the date on which the amount shall be declared in Court being fixed in the decree. There is nothing to this effect in s. 86.

For the present procedure in the case of simple mortgages see *ante*, pp. 448 *et seq.* The practical result of the procedure prescribed by this section will apparently be much the same as that of the old procedure.

<sup>(4)</sup> Compare the form in Seton on Decrees, 4th ed., pp. 1037 and 1038, and that contained in No. 128 of the Fourth Schedule to the Code of Civil Procedure, which this section generally follows.

<sup>(5)</sup> Compare the Conveyancing and Law of Property Act, 1881, (44 and 45 Vic. c. 41) s. 25 (2) from which this paragraph is taken. As the paragraph is limited in its application to English mortgages, these being the only other mortgages besides mortgages by conditional sale in which a suit for foreclosure can be brought [see *ante*, p. 692 note <sup>(1)</sup>], the section will make no important change in the law. It would, however, have been otherwise had the provision as passed

been, as it was until the Bill reached its very last stage, applicable to mortgages by conditional sale.]

**89.** If in any case under section eighty-eight the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him and such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put in possession of the mortgaged property <sup>(1)</sup>; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section eighty-eight <sup>(2)</sup>; and thereupon the defendant's right to redeem and the security shall both be extinguished <sup>(3)</sup>.

[(<sup>1</sup>) See *ante*, p. 448 and p. 694, note (<sup>1</sup>) on s. 87.]

(<sup>2</sup>) As to the second portion of the section requiring the Court to pass an order absolute for sale, this is not in accordance with the present practice in England under which a further order is only necessary in the case of foreclosure. (See Seton or Decrees, 4th ed., pp. 1089, *et seq.*)

(<sup>3</sup>) As on the passing of an order absolute for sale the defendant's right to redeem and the security are extinguished, it is clear that the defendant cannot *redeem* the mortgage after the passing of such an order. And if the effect of this were that the defendant could not pay off the amount due after an order for sale had been passed, this provision would be most inequitable, for it would amount to this, that a mortgagor who was willing to pay the amount of his debt would be absolutely prohibited from doing so, and that a Court would be compelled to sell a property in order that a mortgagee might receive payment of that which the mortgagor was before, and at the time of the sale, perfectly ready and willing to pay him.

It is submitted, however, that, though the effect of the provision is no doubt to extinguish the mortgagor's right to redeem, he still has the same right as any other judgment-debtor has, to pay off

the amount of his debt any time before actual execution, that is, before the property is sold. In other words, though he may not, after an order absolute for sale, pay the money as a mortgagor, he may do so as a judgment-debtor. There seems to be nothing in this view which is inconsistent with the section, and, as it favours equity, it is one which, it is submitted, may well be adopted. Further, as on the passing of an order absolute for sale, the security is extinguished, the mortgagee's interest in the property must then also come to an end. The effect of this must, it is submitted, be that the entire ownership of the property reverts to the mortgagor, for after the mortgagee's interest in the property is extinguished, there is nothing to limit the full ownership which is vested in the mortgagor. In the event, therefore, of the mortgagor paying off his debt after such an order as above suggested, no retransfer of the property by the judgment-creditor to the judgment-debtor would appear to be necessary, inasmuch as the full ownership of the property reverted to the judgment-debtor when the order absolute for sale was made. The same principles would seem to apply if a conveyance be made to the purchaser at the sale. The Act itself does not contemplate any such conveyance, nor does one appear to be necessary, the right, title and interest both of the mortgagor and the mortgagee passing by the certificate of sale (see *ante*, p. 483); but when a conveyance is executed, as the Calcutta High Court by their rule under s. 104 of the Act (see *post*, p. 736, App. B, rule 14) suggest that it may be in certain cases, it will apparently be sufficient if, as proposed in the rule referred to, it be made by the mortgagor alone.

It may be noticed that the Bill as first introduced had a provision that the mortgagee might not bid for or acquire any interest in the property sold without the leave of the Court, or without submitting to such conditions as the Court might impose. But this provision was subsequently omitted, the point being provided for by s. 294 of the Code of Civil Procedure. (See also *ante*, pp. 497, 498.)

90. When the nett proceeds of any such <sup>(1)</sup> sale are insufficient to pay the amount due for Recovery of balance due on mortgage, the time being on the mortgage, <sup>(2)</sup> if the balance is legally recoverable from the defendant otherwise than out of the property sold <sup>(3)</sup>, the Court may pass a decree for such sum. <sup>(4)</sup>

[<sup>(1)</sup> See *ante*, p. 448.

The use of this word "such" would seem to confine the application of this section to sales under the preceding provisions, and to exclude sales under s. 93. This cannot, however, have been intended, and the Courts would probably hold that the section covered all sales in mortgage suits.

(<sup>2</sup>) These words would not appear to include the costs of the suit, (compare *ante*, s. 86, first para., where the amount due for principal and interest on the mortgage, and costs of suit are distinguished). This section would apparently not be applicable, therefore, if the plaintiff only wished to recover the costs of suit.

(<sup>3</sup>) The balance can only be recoverable from the defendant otherwise than out of the property sold when the mortgagee has a right to sue the mortgagor for the mortgage-money (as to which see *ante*, s. 68).

(<sup>4</sup>) It is not very clear from these words, whether the Court may *in the suit for sale* pass a further decree or order for the recovery of the balance due, or whether the decree must be passed *in a fresh suit*. In the earlier stages of the Bill the provision was that the balance "may be recovered (if the Court think fit) in the same suit in the same manner as under a decree for money, or by any other legal process open to the mortgagee." But in the Bill, as presented by the Select Committee with their final report, dated 24th January 1882, the section was recast in its present form without any explanation of the change being given.

The section is probably intended to give power to pass the decree in the suit for sale. This, at any rate, is the view taken by the Calcutta High Court, which has made a rule (see *post*, p. 735, App. B, rule 12) that every decree for sale shall contain a declaration, that in the event of the proceeds of sale being insufficient the defendant shall pay the deficiency. This is in accordance with its former practice (see Belchambers' Rules and Orders, p. 168). If the plaintiff is entitled to recover the mortgage-money from the defendant otherwise than out of the property sold, and neglects to include his claim to do this in his suit for sale, a subsequent suit to enforce this claim will be barred under s. 43 of the Code of Civil Procedure. If it had been the intention of the framers of this section to give a power to bring a further suit notwithstanding the provisions of the Code, they would no doubt have saved these provisions expressly as they have done elsewhere (see *post*, s. 99.)]

### *Redemption.*

91. Besides the mortgagor, any of the following persons

Who may sue for re-      may redeem (<sup>1</sup>), or institute a suit for  
demption.                      redemption of (<sup>2</sup>) the mortgaged  
property :—

(a) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property ;

(b) any person having any interest in, or charge upon, the right to redeem the property <sup>(a)</sup> ;

(c) any surety for the payment of the mortgage-debt or any part thereof ;

(d) the guardian of the property of a minor mortgagor on behalf of such minor ;

(e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot <sup>(1)</sup> ;

(f) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property <sup>(2)</sup> ;

(g) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property <sup>(3)</sup>.

[<sup>(1)</sup> See *ante*, pp. 327-335.

<sup>(2)</sup> It is not clear why the section is expressed in the alternative. It would seem to have been sufficient, with reference to s. 60, simply to define the persons who "may redeem," without any reference to the right to "institute a suit for redemption."

<sup>(3)</sup> Clauses (a) and (b) might, it is submitted, have been run into one clause, and have been "any person having an interest in the property comprised in a mortgage," (see *ante*, p. 690, s. 85). The other clauses would seem either to be superfluous, or they ought to have been set out in s. 85. All persons having the right to redeem should most certainly be made parties to mortgage suits. It is submitted that these clauses are really unnecessary, as clauses (a) and (b) really cover all cases.

As, however, the section enumerates so many other cases in which the right to redeem exist, it might have been well, had it also noticed that the Crown may redeem such estates as vest in it by forfeiture. (See 2 Fisher's Law of Mortgage, 3rd ed., p. 762, and Seton on Decrees, 4th ed., p. 1051).

<sup>(4)</sup> It seems doubtful whether this clause, as it stands, would cover the case of the Court of Wards, when the mortgagor has been placed under its superintendence by the Local Government.

( ) This clause is opposed to the case referred to *ante*, p. 329.

<sup>(6)</sup> For this clause, see 2 Fisher's Law of Mortgage, 3rd ed., p. 768, and Seton on Decrees, 4th ed., p. 1051.]

92. In a suit for redemption <sup>(1)</sup>, if the plaintiff succeeds, the Court shall pass a decree  
Decree in redemption-suit. <sup>(2)</sup> ordering <sup>(3)</sup>—

that an account be taken of what will be due to the defendant for the mortgage-money and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree;

that, upon the plaintiff paying to the defendant or into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall retransfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property <sup>(4)</sup>; and

that if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold <sup>(5)</sup>.

[<sup>(1)</sup> See *ante*, pp. 402 and 546, and for the nature of the right to redemption, see *ante*, p. 658, s. 60, first para.]

It may be noticed, however, that the form of decree prescribed by this section does not fit in exactly with the provisions of that section. Thus, while under s. 60 an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished is sufficient, a decree under this section must always direct a transfer of the property to the plaintiff. Again, under s. 60, the mortgagor is only entitled to have the mortgage-deed delivered up to him, whilst a decree under this section requires the surrender to the plaintiff of all documents in the possession of the defendant relating to the mortgaged property.

(2) For the Court in which a suit for redemption may be brought, see *ante*, pp. 374, 375.

(3) For the common form of decree in a redemption suit in England, see Seton on Decrees, 4th ed., p. 1040.

The form of decree directed by this section differs from the form there set out, in that it does not provide for cases in which, on the account being taken, nothing is found to be due to the defendant, or an amount of excess payments is found to be due from the defendant.

(4) As regards the second and third paras. of this section, see *ante*, pp. 692-693 the notes on s. 86 to the first and second paras. of which they correspond, though there are some, apparently unnecessary, verbal differences. Thus it is not clear why in s. 86 the account is to be taken of what is due "for principal and interest on the mortgage," whilst here it is of what is due "for the mortgage-money" (for definition of "mortgage-money," see *ante*, s. 58); why by s. 86 the decree is to direct the plaintiff to "transfer" the property to the defendant, while here the direction is that the defendant shall "retransfer" the property to the plaintiff; or why by this section this retransfer is to be "free from the mortgage and all incumbrances," whilst in s. 86 no specified reference to the mortgage is made.

(5) The practice in England formerly was for the decree to direct that on failure of the plaintiff to pay the amount on the due date the suit should be dismissed (see Seton on Decrees, 4th ed., p. 1040), the dismissal being held to operate as a judgment of foreclosure (see 2 Fisher's Law of Mortgage, 3rd ed., p. 1106). Now, however, under the Conveyancing and Law of Property Act, 1881, (44 and 45 Vic. c. 41) s. 25, the Court may order a sale in a suit for redemption.

The effect of this paragraph would appear to be that in the case of a redemption suit on failure of the plaintiff to pay the amount found due within the specified time, the Court may order—

- (a) If the mortgage is an English mortgage, either foreclosure or sale;
- (b) If the mortgage is a mortgage by conditional sale, foreclosure; and
- (c) If the mortgage is a simple mortgage, or an usufructuary mortgage, sale.

So far as the other mortgages are concerned, this provision appears to be all right, but in the case of an usufructuary mortgage there is this curious result that, though the mortgagee can sue for neither foreclosure or sale in the case of this mortgage [see *ante*, s. 67, cl. (a)], the Court may, in a suit by the mortgagor for redemption, order a sale in the event of the plaintiff failing to pay the mortgage-money on the due date.]



93. If payment is made of such amount and of such  
In case of redemption, possession. • subsequent costs as are mentioned in  
section ninety-four, the plaintiff shall,  
if necessary, be put into possession of the mortgaged property. (1)

If such payment is not so made, the defendant may (unless  
In default, foreclosure or sale. the mortgage is simple or usufructuary) apply to the Court for an order  
that the plaintiff and all persons claiming through or under  
him be debarred absolutely of all right to redeem, or (unless  
the mortgage is by conditional sale) for an order that the  
mortgaged property be sold. (2)

If he applies for the former order, the Court shall pass an  
order that the plaintiff, and all persons claiming through or  
under him, be absolutely debarred of all right to redeem the  
mortgaged property, and may, if necessary, deliver possession  
of the property to the defendant. (3)

If he applies for the latter order, the Court shall pass an  
order that such property or a sufficient part thereof be sold,  
and that the proceeds of the sale (after defraying thereout  
the expenses of the sale) be paid into Court and applied in  
payment of what is found due to the defendant, and that  
the balance be paid to the plaintiff or other persons entitled  
to receive the same. (4)

On the passing of any order under this section the plaintiff's right to redeem and the security shall, as regards the  
property affected by the order, both be extinguished (5) :

Provided that the Court may, upon good cause shown  
and upon such terms, if any, as it  
Power to enlarge time. thinks fit, from time to time postpone  
the day fixed under section ninety-two for payment to the  
defendant. (6)

[(1) See *ante*, p. 402, and compare *ante*, p. 694, s. 87, first paragraph and note (1) thereon.

(<sup>2</sup>) See *ante*, p. 702, s. 92, note (<sup>5</sup>). This paragraph is rather loosely worded. It would seem to give a discretion to the defendant to apply in the case of an English mortgage for an order absolute for foreclosure or sale as he thinks fit, but it must be intended that he should only apply for an order absolute enforcing the remedy prescribed by the decree.

(<sup>3</sup>) Compare *ante*, p. 694, s. 87, second paragraph (order absolute for foreclosure) and note (1) thereon.

(<sup>4</sup>) Compare *ante*, p. 697, s. 89 (order absolute for sale) and notes thereon.

(<sup>5</sup>) See *ante*, pp. 697, 698, s. 89, note (<sup>3</sup>), as to the effect of an order absolute for sale. The effect of an order absolute for foreclosure (see *ante*, s. 87), which is one of the orders which can be made under this section, does not appear, however, to be provided for. It might be argued, therefore, that, when an order absolute for foreclosure is made in a redemption suit, the debt secured by the mortgage is not deemed to be discharged, though it is so when a similar order is made in a suit for foreclosure.

(<sup>6</sup>) Compare *ante*, p. 694, s. 87, proviso, and note (<sup>3</sup>) thereon.]

**94.** In finally adjusting the amount to be paid to a mortgagee in case of a redemption or a sale by the Court under this chapter, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs (<sup>1</sup>), add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment. (<sup>2</sup>)

Costs of mortgagee subsequent to decree.

[<sup>(1)</sup> See *ante*, p. 377, and for some cases in which the conduct of the mortgagee has been held to be such as to disentitle him to costs, see Seton on Decrees, 4th ed., pp. 1060, 1061.

(<sup>2</sup>) Such would apparently be the costs in connection with an order absolute for foreclosure or sale, the costs of a sale or the giving of possession, the costs of the retransfer of the property, &c. &c.]

**95.** Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors

Charge of one of several co-mortgagors who redeems.

in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession. (1)

[(1) See *ante*, pp. 342, 343.

This section was inserted in the Bill by the Law Commissioners of 1879, who said (see their Report, dated 15th November 1879, p. 34) :—"Where one of several mortgagors redeem the mortgaged property, and obtains possession thereof, we think that he should be declared entitled to a charge on the share of each of the other co-mortgagors in the property, for his proportion of the costs properly incurred in so redeeming and obtaining possession. A decision of the late Sadar Court North-Western Provinces" [probably that referred to *ante*, p. 343 note (s.)] "is to this effect. The High Court of Bombay also has ruled that the purchaser of the interest of one of several co-sharers in an equity of redemption may redeem the whole property, and hold it subject to the rights on contribution of the other co-sharers."

The only difference between the section as proposed by the Law Commissioners, and as it became law, is that the word "expenses" has been substituted for the word "costs." This substitution was probably intended to make it clear that the charge extends to the proportion as well of the mortgage debt paid as of the costs incurred in connection with the redemption suit.

It will be observed that the section speaks of the mortgagor, who redeems "*obtaining* possession" of the mortgaged property. These words would seem to be inappropriate in cases in which the mortgagors are themselves in possession of the mortgaged property, when there would be no necessity to *obtain* possession on redemption.]

### *Sale of Property subject to prior Mortgage.*

96. If any property the sale of which is directed under

this chapter is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold. (1)

[(1) Compare the Code of Civil Procedure, s. 295, proviso cl. (b), which applies, however, to all sales in execution of decrees, and not merely to sales under mortgage decrees.]

Application of pro-  
ceeds.

**97.** Such proceeds shall be brought into Court and applied as follows :—

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale ;

secondly, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage ;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or, if there be more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt. <sup>(1)</sup>

Nothing in this section or in section ninety-six shall be deemed to affect the powers conferred by section fifty-seven. <sup>(2)</sup>

[<sup>(1)</sup> Compare the Code of Civil Procedure, s. 295, proviso cl. (c). Though generally similar this section provides for a case which the clause in the Code above referred to does not appear to cover, namely, that of an incumbrance *prior* to the incumbrance which is the subject of the suit. On the other hand, this section contains no provision similar to the fourth case put in cl. (c) of the proviso to s. 295 of the Code, for the application of the proceeds of sale among money decree-holders, such persons, scarcely being persons "interested in the property sold."

<sup>(2)</sup> This section deals with the discharge of incumbrances on sale.]

#### *Anomalous Mortgages.*

**98.** In the case of a mortgage not being a simple mort-

Mortgage not described in section 58, clauses (b), (c), (d) and (e).

gage, a mortgage by conditional sale, an usufructuary mortgage, or an English mortgage, or a combination

of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage. (1)

[(1) See *ante*, pp. 20—23.

It will be observed that the case of a mortgage which is a combination of a simple mortgage and an usufructuary mortgage (*i.e.*, a simple mortgage usufructuary, see *ante*, p. 21) or of a mortgage which is a combination of a mortgage by conditional sale and an usufructuary mortgage (*i.e.*, a *bye-bil-wufu* or *kut-kubala* usufructuary, see *ante*, p. 21) is excluded from this section, whilst it is not specifically provided for elsewhere in the Act. This was noticed by the Law Commissioners of 1879 (see p. 34 of their Report, dated 15th November 1879). Mr. Stokes wished to insert a couple of sections, defining these mortgages very similarly to the manner in which they are defined, *ante*, p. 21. Sir Charles Turner thought that it would be enough to insert a simple declaration that the mortgagee and the mortgagor have respectively the same rights and liabilities as are declared to be created in each of the several forms so combined, so far as such rights and liabilities are consistent with the mortgagee's availing himself of any of his remedies. Mr. West, however, thought that the general provisions of the Bill sufficiently covered the matter. The opinion of Mr. West must have been the one adopted by the Select Committee by which the Bill was subsequently settled, as they never thought fit to add any special provisions with reference to this point. In the cases of such mortgages, therefore, the general rule which Sir Charles Turner proposed may, though it was never specially enacted, be taken to be the reasonable one to follow.

It may not be out of place to observe that, though this section covers mortgages of all kinds, however peculiar their provisions may be, still it does not extend to any arrangement which does not fall within the definition of mortgage as contained in s. 58. Some of the so-called mortgages which exist in various parts of India are probably not mortgages at all, as defined in the Act, and therefore this section does not provide for them.]

### *Attachment of Mortgaged Property.*

99. Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale other-

Attachment of mort-  
gaged property.

wise than by instituting a suit under section sixty-seven, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43. <sup>(1)</sup>

[<sup>(1)</sup> This section makes an important alteration in the law. Its object is to check "the common practice on the part of mortgagees of suing their mortgagors on the debt as such, and in execution selling the mortgagor's interest in the property. This is purchased by strangers to the mortgage, who are thus virtually defrauded by an enforcement of the security, of the existence of which they were wholly ignorant" (see Report of the Indian Law Commissioners of 1879, dated 15th November 1879, p. 35.)

The Law Commissioners accordingly proposed a section, providing that where a mortgagee, in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attached and brought to sale the mortgaged property, or the mortgagor's interest therein, his security should be extinguished, unless, before the issue of the proclamation under the Civil Procedure Code, s. 287, he gave notice thereof to the Court executing the decree. The Select Committee, however, to whom the Bill was subsequently referred, though adopting the principle of the proposed section, preferred to enact the section in its present form, which bars the mortgagee from bringing the mortgaged property to sale, otherwise than by a suit instituted under s. 67 (see the Select Committee's third Report, dated 11th March 1881, p. 3).

It is obvious that, under the section questions of the nature of that discussed *ante*, pp. 473, *et seq.*, can no longer arise.

Section 43 of the Code is the section which bars a subsequent suit in respect of a portion of a claim or a remedy in respect of which the plaintiff originally omitted to sue.

It may be noticed that as an usufructuary mortgagee cannot institute a suit under s. 67 (see p. 667, note <sup>(5)</sup> on cl. (a) of that section) the effect of this section is to prohibit him from ever bringing his mortgagor's property to sale. This seems rather hard in a case where the mortgagor has bound himself to repay the mortgage-money, and the mortgagee has obtained a decree against him in respect of that obligation as he may under s. 68.]

### *Charges.*

100. Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property <sup>(1)</sup>; and all the provisions hereinbefore

Charges,

contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections eighty-one and eighty-two and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge. <sup>(2)</sup>

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust. <sup>(3)</sup>

[<sup>(1)</sup> In the Bill in its earlier stages the definition of a charge was as follows :—

“If by any assurance other than a mortgage deed or by any will, or under the provisions of this or any other Act, or by operation of law, certain immoveable property of one person is made security for the payment of certain money to another, the latter person is said to have a charge on the property.” For this definition the present one was substituted by the Law Commissioners of 1879, and adopted by the Select Committee, but the practical effect of it would not seem to be materially different. The definition appears to cover both charges and liens as defined in 1 Fisher’s Law of Mortgage, 3rd ed., pp. 77, *et seq* and 102, *et seq*. Where it is “by act of parties” (as by settlement, will or other instrument) that the immoveable property is made security the transaction is called a “charge,” whilst a “lien” is the term commonly used when the security is made “by operation of law,” as *e.g.*, by a judgment or under the provisions of some Act.

<sup>(2)</sup> It will be observed that the section limits the relief of the person having the charge to a suit for sale. As stated by the Select Committee, “a person having a charge has a mere right of realization.” (See Select Committee’s Report, dated 2nd February 1878, para. 41).

<sup>(3)</sup> See Lewin on Trusts, 5th ed., p. 454, and the Indian Trusts Act, 1882, s. 32.]

**101.** Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit. <sup>(1)</sup>

Extinguishment of charges.



(<sup>1</sup>) See *ante*, pp. 314, *et seq.*, and compare Coote on Mortgages, 4th ed., pp. 645 and 646.

The section is referred to approvingly by *Melville*, J., in the Bombay Full Bench case of *Mulchand Kuber v. Lallu Trikam*. \*

The Law Commissioners of 1879 thus report on this section. (See their Report, dated 15th November 1879, p. 35): "The section relating to the merger of charges is, in the opinion of Mr. Stokes and Sir Charles Turner, in exact accordance with the English and Indian decisions on the subject. Mr. West would substitute the following: 'The holder of one or two or more incumbrances may purchase another, or the property subject thereto, and hold the same with his original incumbrance as separate interests.'"

With great deference to the opinions of the learned Commissioners, it is submitted that the section would have been more correct and fitted in better with the rest of the Act had it run: "Where a mortgagee or the owner of a charge is or becomes absolutely entitled to the immoveable property which is the subject of the mortgage or charge, the mortgage or charge shall be extinguished as against subsequent mortgagees or owners of charges unless, &c." The term "incumbrance" used in this section is probably used as equivalent to "mortgage." It is clear that it must be something different from a charge, from which it is distinguished.]

### *Notice and Tender. †*

102. Where the person on or to whom any notice or

Service or tender on  
or to agent.

tender is to be served or made under  
this chapter does not reside in the  
district (<sup>1</sup>) in which the mortgaged prop-

erty or some part thereof is situate, service or tender on  
or to an agent holding a general power-of-attorney from such  
person or otherwise duly authorized to accept such service  
or tender (<sup>2</sup>) shall be deemed sufficient.

Where the person or agent on whom such notice should  
be served cannot be found in the said district, or is unknown

\* I. L. R. 6 Bom. 404 (*cf.* p. 415.)

† These provisions were introduced by the Law Commissioners with the remark that "we all think that the Bill should contain provisions as to serving notices and making or accepting tenders and deposits under this chapter, when the person concerned is non-resident, or unknown, or incompetent to contract. These provisions (which will be found in the revised Bill, ss. 101, 102)" (now ss. 102 and 103) "are novel; but they are suggested by difficulties which have occurred in practice," (See Report, dated 15th November 1879, p. 35).

to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, <sup>(3)</sup> and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient.

Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown to the person desiring to make the tender, the latter person may deposit in such Court as last aforesaid the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount <sup>(4)</sup>.

(1) The word "district" used in this section is not defined either in this Act or in the Indian Contract Act with which this Act is to be read (see *ante*, s. 4). In the absence of any special definition, the word will probably be held to have the meaning given to it in the Code of Civil Procedure, s. 2.

(2) Were it not that the power-of-attorney must be *general*, the words "or *otherwise* duly authorized to accept such service or tender," might be held to make it necessary that the person holding a power-of-attorney should be specially authorized thereby to accept service or tender.

(3) As to the Court in which a suit for redemption may be instituted, see *ante*, pp. 374, 375.

(4) Compare *ante*, pp. 688-689, s. 83, as to deposit in Court.]

**103.** Where, under the provisions of this chapter, a

Notice, &c., to or by  
person incompetent to  
contract.

notice is to be served on or by, or  
a tender or deposit made or accepted  
or taken out of Court by, any person

incompetent to contract, such notice may be served, or tender or deposit made, accepted or taken, by <sup>(1)</sup> the legal curator of the property of such person <sup>(2)</sup>; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this chapter, application may be made to any Court in which

a suit might be brought for the redemption of the mortgage <sup>(3)</sup> to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice <sup>(4)</sup>, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of Chapter XXXI of the Code of Civil Procedure shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder <sup>(5)</sup>.

[<sup>(1)</sup> There seems to be some confusion in the drafting here. The words "on or by" should apparently have been inserted after the words "such notice may be served." As the clause stands, though the opening words refer to the case of the service of a notice *on* an incompetent person, no provision is made by the second part of the clause for such service, but only for service by an incompetent person.

<sup>(2)</sup> The term "legal curator" is, it is presumed, intended to cover all authorities and persons, however designated, in whom under the various laws referred to, *ante*, Chap. III, the care of the property of an incompetent person may be vested.

<sup>(3)</sup> For the Court in which a suit for redemption may be brought, see *ante*, pp. 374, 375.

<sup>(4)</sup> It seems difficult to conceive a case in which the service of a notice *on* an incompetent person would be requisite or desirable in the interests of such person. Service of notice by him would, of course, often be. The section, however, distinctly contemplates cases in which receiving service of a notice would also be so.

<sup>(5)</sup> The provisions of Chap. XXXI of the Code are those relating to suits by and against minors and persons of unsound mind.

104. The High Court may, from time to time, make rules consistent with this Act for carrying out in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this chapter <sup>(1)</sup>.

<sup>(1)</sup> For the rules made by the Calcutta High Court under this section, and applicable to the Original Side, see *post*, pp. 733, 737, App. B.

These are the only rules which, so far as is known, have as yet been made under the section.]

## CHAPTER V.

## OF LEASES OF IMMOVEABLE PROPERTY.

105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

The transferor is called the lessor, the transferee is called the lessee; the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

107. A lease of immoveable property from year to year,  
or for any term exceeding one year,  
Leases how made. or reserving a yearly rent, can be  
made only by a registered instrument.

All other leases of immoveable property may be made  
either by an instrument or by oral agreement.

108. In the absence of a contract or local usage to the  
contrary, the lessor and the lessee of  
Rights and liabilities of lessor and lessee. immoveable property, as against one  
another, respectively, possess the rights and are subject to  
the liabilities mentioned in the rules next following, or  
such of them as are applicable to the property leased :—

*A.—Rights and Liabilities of the Lessor.*

(a) The lessor is bound to disclose to the lessee any  
material defect in the property, with reference to its intended  
use, of which the former is, and the latter is not aware,  
and which the latter could not with ordinary care discover :

(b) the lessor is bound on the lessee's request to put  
him in possession of the property :

(c) the lessor shall be deemed to contract with the lessee  
that, if the latter pays the rent reserved by the lease and  
performs the contracts binding on the lessee, he may hold  
the property during the time limited by the lease without  
interruption.

The benefit of such contract shall be annexed to and go  
with the lessee's interest as such, and may be enforced by  
every person in whom that interest is for the whole or any  
part thereof from time to time vested.

*B.—Rights and Liabilities of the Lessee.*

(d) If during the continuance of the lease any accession  
is made to the property, such accession (subject to the law  
relating to alluvion for the time being in force) shall be  
deemed to be comprised in the lease :

(e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor :

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor :

(h) the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth ; provided he leaves the property in the state in which he received it :

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them :

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease :

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee :

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest :

(l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf :

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition ; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left :

(n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor :

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own ; but he must not use, or permit



another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto :

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes :

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it ; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him :

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

**110.** Where the time limited by a lease of immoveable property is expressed as commencing

Exclusion of day on which term commences.

from a particular day, in computing that time such day shall be excluded.

Where no day of commencement is named, the time so limited begins from the making of the lease.

Where the time so limited is a year or a number of years, in the absence of an express agreement

Duration of lease for a year.

to the contrary, the lease shall last during the whole anniversary of the

day from which such time commences.

Where the time so limited is expressed to be terminable before its expiration, and the lease

Option to determine lease.

omits to mention at whose option it is so terminable, the lessee, and not the

lessor, shall have such option.

**111.** A lease of immoveable property determines—

Determination of lease.

(a) by efflux of the time limited thereby:

(b) where such time is limited conditionally on the happening of some event—by the happening of such event:

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event:

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right:

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them.

(f) by implied surrender:

(g) by forfeiture ; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void ; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; and in either case the lessor or his transferee does some act showing his intention to determine the lease :

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

*Illustration to clause (f).*

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

**112.** A forfeiture under section one hundred and eleven, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting :

Provided that the lessor is aware that the forfeiture has been incurred :

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

**113.** A notice given under section one hundred and eleven, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

*Illustrations.*

(a). A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b). A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

**114.** Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

**115.** The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees or relief against the forfeiture is granted under section one hundred and fourteen.

**116.** If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section one hundred and six.

*Illustrations.*

(a). A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(b). A lets a farm to B for the life of C. C dies but B continues in possession with A's assent. B's lease is renewed from year to year.

**117.** None of the provisions of this chapter apply to leases for agricultural purposes, except in so far as the Local Government, with the previous sanction of the Governor-General in Council, may by notification published in the local official Gazette declare all or any of such provisions to be so applicable, together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

## CHAPTER VI.

### OF EXCHANGES.

**118.** When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange."

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

119. In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him.

Right of party deprived of thing received in exchange.

120. Save as otherwise provided in this chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

Rights and liabilities of parties.

121. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

Exchange of money.

## CHAPTER VII.

### OF GIFTS.

122. "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

"Gift" defined.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

Acceptance when to be made.

If the donee dies before acceptance, the gift is void.

**123.** For the purpose of making a gift of immoveable property, the transfer must be effected Transfer how effected. by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

**124.** A gift comprising both existing and future property is void as to the latter. Gift of existing and future property.

**125.** A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted. Gift to several, of whom one does not accept.

**126.** The donor and donee may agree that on the happening of any specified event which When gift may be suspended or revoked. does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revokable wholly or in part at the mere will of the donor is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.



*Illustrations.*

(a). A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(b). A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

*Illustrations.*

(a). A has shares in X, a prosperous joint stock company, and also shares in Y, a joint stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(b). A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

128. Subject to the provisions of section one hundred and twenty-seven, where a gift consists of the donor's whole property,

Universal donee.

the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein.

**129.** Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law, or, save as provided by section one hundred and twenty-three, any rule of Hindu or Buddhist law.

Saving of donations  
*mortis causâ* and Mu-  
hammadan law.

## CHAPTER VIII.

### OF TRANSFERS OF ACTIONABLE CLAIMS.

**130.** A claim which the Civil Courts recognise as affording grounds for relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary. (')  
[<sup>(1)</sup>. See *ante*, p. 288.]

Actionable claim.

**131.** No transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer; and every dealing by such debtor or person, not being a party to, or otherwise aware of, and not having received express notice of a transfer, with the debt or property shall be valid as against such transfer.

Transfer of debts.

#### *Illustration.*

A owes money to B who transfers the debt to C. B then demands the debt from A, who, having no notice of the transfer, pays B. The payment is valid, and C cannot sue A for the debt.

**132.** Every such notice must be in writing signed by the person making the transfer, or by his agent duly authorized in this behalf.

Notice to be in writing  
signed.

**133.** On receiving such notice, the debtor or person  
 Debtor to give effect in whom the property is vested shall  
 to transfer. give effect to the transfer unless  
 where the debtor resides, or the property is situate, in a  
 foreign country and the title of the person in whose favour  
 the transfer is made is not complete according to the law  
 of such country.

**134.** Where the transferor of a debt warrants the  
 Warranty of solvency solvency of the debtor, the warranty,  
 of debtor. in the absence of a contract to the  
 contrary, applies only to his solvency at the time of the  
 transfer, and is limited, where the transfer is made for  
 consideration, to the amount or value of such con-  
 sideration.

**135.** Where an actionable claim is sold, he against  
 Discharge of person whom it is made is wholly discharged  
 against whom claim is sold. by paying to the buyer the price  
 and incidental expenses of the sale,  
 with interest on the price from the day that the buyer  
 paid it.

Nothing in the former part of this section applies—

(a) where the sale is made to the co-heir to, or co-pro-  
 prietor of, the claim sold ;

(b) where it is made to a creditor in payment of what is  
 due to him ;

(c) where it is made to the possessor of a property sub-  
 ject to the actionable claim ;

(d) where the judgment of a competent Court has been  
 delivered affirming the claim, or where the claim has been  
 made clear by evidence and is ready for judgment.

**136.** No judge, pleader, mukhtar, clerk, bailiff or other officer connected with Courts of Justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions.

**137.** The person to whom a debt or charge is transferred shall take it subject to all the liabilities to which the transferor was subject in respect thereof at the date of the transfer.

*Illustration.*

A debenture is issued in fraud of a public company to A. A sells and transfers the debenture to B, who has no notice of the fraud. The debenture is invalid in the hands of B.

**138.** When a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if recovered by either the transferor or transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor. <sup>(1)</sup>

[<sup>(1)</sup> For mortgages of debts, see 2, Davidson's Precedents, 2nd ed., pp. 600 *et seq.*]

**139.** Nothing in this chapter applies to negotiable instruments.

## THE SCHEDULE.

### (a.) STATUTES.

Year and Chapter.	Subject.	Extent of repeal.
27 Hen. VIII, c. 10.	Uses ...	The whole.
13 Eliz., c. 5 ...	Fraudulent conveyances ...	The whole.
27 Eliz., c. 4 ...	Fraudulent conveyances ...	The whole.
4 Wm. & Mary, c. 16.	Clandestine mortgages ...	The whole.

## (b). ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.

Number and Year.	Subject.	Extent of repeal.
IX of 1842	Lease and release ...	The whole.
XXXI of 1854	Modes of conveying land ...	Section 17.
XI of 1855	Mesne profits and improvements.	Section 1; in the title, the words "to mesne profits and," and in the preamble "to limit the liability for mesne profits and."
XXVII of 1866	Indian Trustee Act ...	Section 31.
IV of 1872	Panjáb Laws Act ...	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875	Central Provinces Laws Act. ...	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVIII of 1876	Oudh Laws Act ...	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877	Specific Relief ...	In sections 35 and 36, the words "in writing."

## (c). REGULATIONS.

Number and Year.	Subject.	Extent of repeal.
Bengal Regulation I of 1798 ...	Conditional sales ...	The whole Regulation.
Bengal Regulation XVII of 1806 ...	Redemption ...	The whole Regulation.
Bombay Regulation V of 1827. ...	Acknowledgment of debts: Interest: Mortgagees in possession.	Section 15.

## APPENDIX A.

SECTIONS 6 to 19 of *Trustee's and Mortgagee's Powers Act, (Act XXVIII of 1866)*, referred to in s. 69 of the *Transfer of Property Act, IV of 1882*.

### POWERS OF MORTGAGEES.

6. Where any principal money is secured or charged by deed on any immoveable property, or any interest there-  
Powers incident to in, the person to whom such money shall  
mortgages. for the time being be payable, his executors, administrators and assigns, shall, at any time after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, namely :—

1st.—A power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property, from time to time, in like manner :

2nd.—A power to appoint or obtain the appointment of a Receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned. (a).

7. Receipts for purchase money given by the person or persons exercising the power of sale hereby conferred, shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money. (b).

---

(a) See 23 and 24 Vic. c. 145, s. 11, and compare 44 and 45 Vic. c. 41, s. 19, cls. (i) and (ii).

(b) See 23 and 24 Vic. c. 145, s. 12, and compare 44 and 45 Vic. c. 41, s. 22 (1).

8. No such sale as last aforesaid shall be made until after six months' notice in writing given to the

person or one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of such property ; but when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no such notice as aforesaid had been given ; but any person damaged by any such unauthorized exercise of such power, shall have his remedy in damages against the person or persons selling. (c).

9. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same

as follows :—first, in payment of all the expenses incident to the sale or incurred in any attempted sale ; secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made ; and thirdly, in discharge of all the principal monies then due in respect of such charge ; and the residue of such money shall be paid to the person entitled to the property subject to the charge, his executors, administrators or assigns, as the case may be. (d).

10. The person exercising the power of sale hereby conferred

shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein which the person who created the charge had power to dispose of : Provided that nothing herein contained shall be construed to authorize the mortgagee of a term of years to sell and convey the fee-simple of the property comprised therein in cases where the mortgagor could have disposed of such fee-simple at the date of the mortgage. (e).

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(c) See 23 and 24 Vic. c. 145, s. 13, and compare 44 and 45 Vic. c. 41, ss. 20 cl. (2) and 21 (2).

(d) See 23 and 24 Vic. c. 145, s. 14, and compare 44 and 45 Vic. c. 41, s. 21 (3).

(e) See 23 and 24 Vic. c. 145, s. 15, and compare 44 and 45 Vic. c. 41, s. 21 (1).



11. At any time after the power of sale hereby conferred shall have become exercisable, the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed or surrendered to and were then vested in him for all the estate and interest which the person creating the charge had power to dispose of; and where the legal estate shall be outstanding in a Trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made. (f).

12. Any person entitled to appoint or obtain the appointment of a Receiver as aforesaid, may from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person or any one of such persons to be Receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as Receiver, and if no such appointment be made within ten days after such requisition, then may in writing appoint any person he may think fit. No person shall be ineligible for the office of Receiver merely because he is an Officer of the High Court. (g).

13. Every Receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults, unless otherwise provided for in the charge. (h).

(f) See 23 and 24 Vic. c. 145, s. 16, and compare 44 and 45 Vic. c. 41, s. 21 (7).

(g) See 23 and 24 Vic. c. 145, s. 17, and compare 44 and 45 Vic. c. 41, s. 24 (1).

(h) See 23 and 24 Vic. c. 145, s. 18, and compare 44 and 45 Vic. c. 41, s. 24 (2).

14. Every Receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues and profits of the property of which he is appointed Receiver, by suit, distress, or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of. (i).

15. Every Receiver appointed as aforesaid may be removed by the like authority, or on the like requisition as before provided with respect to the original appointment of a Receiver, and new Receivers may be appointed from time to time. (j).

16. Every Receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges, and expenses whatsoever, such a commission, not exceeding five *per centum* on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then five *per centum* on such gross amount (k).

17. Every Receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge which is in its nature insurable. (l).

18. Every Receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of Government revenue and of all taxes, rates and assessments whatsoever, and in payment of his commission as aforesaid, and of

(i) See 23 and 24 Vic. c. 145, s. 19, and compare 44 and 45 Vic. c. 41, s. 24 (3).

(j) See 23 and 24 Vic. c. 145, s. 20, and compare 44 and 45 Vic. c. 41, s. 24 (5).

(k) See 23 and 24 Vic. c. 145, s. 21, and compare 44 and 45 Vic. c. 41, s. 24 (6).

(l) See 23 and 24 Vic. c. 145, s. 22, and compare 44 and 45 Vic. c. 41, s. 24 (7).

the premiums on the insurances, if any ; and in the next place in payment of all the interest accruing due in respect of any principal money then charged on the property over which he is Receiver, or on any part thereof ; and, subject as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators or assigns. (m).

19. The powers and provisions contained in ss. 6 to 18 of this Act, both inclusive, relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt. (n).

## APPENDIX B.

*Rules made by the Calcutta High Court under the provisions of section 104 of the Transfer of Property Act, IV of 1882. (o)*

Application under s. 83. 1. Every application, under s. 83, shall be made by a verified petition, stating the facts.

2. Unless otherwise ordered, there shall be paid into Court, in addition to the sum deposited under s. 83, or any subsequent section, a sum sufficient to provide for the fees and charges of the Accountant-General and the Bank of Bengal, and for the mortgagee's costs of obtaining payment out of Court ; and also when such payment is made under section 83, a further sum to provide for the mortgagee's costs of transferring the property, and causing such transfer to be registered ; such costs to be estimated and certified by the Taxing officer.

Payment into Court of costs and expenses, under s. 83 or any subsequent section.

Costs to be estimated and certified.

(m) See 23 and 24 Vic. c. 145, s. 23, and compare 44 and 45 Vic. c. 4, s. 24 (8).

(n) See 23 and 24 Vic. c. 145, s. 24, and compare 44 and 45 Vic. c. 41, s. 2, cl. (vi).

(o) These rules, dated 31st July 1884, were published in the *Calcutta Gazette*, August 6th, 1884, Part I, page 834.

3. Every order for payment of money into Court, under section 83, shall specify the sums to be paid, and the purpose for which each sum is intended.

Order for payment of money into Court under s. 83.

4. Unless otherwise ordered, the applicant, or his attorney, shall serve, or cause to be served, the notice to be given under section 83.

Service of notice under s. 83.

5. When money is paid into Court under section 86, or under any subsequent section, the person making such payment shall forthwith give written notice thereof to the person or persons on whose account such payment is made.

Of notice of payment under any subsequent section.

6. Every application by a mortgagee to obtain payment of money out of Court shall be by a verified petition.

Application for payment of money out of Court under s. 57 (c)

And, when made under section 83, it shall be shown whether the property has been transferred, and [where the applicant was in possession] possession delivered up, free from encumbrance, and whether the transfer has been registered. The documents of title, which were held by the applicant, shall also be accounted for.

Or, when made under section 86 or section 92, it shall be shown that the provisions of such section have been complied with.

Or under s. 86 or s. 92.

Or, when made under sections 88 and 89 or section 93, the documents of title, which were held by the applicant, shall be accounted for.

Or under ss. 88 and 89 or s. 93.

7. Every application under the last preceding rule shall be on notice to the person by whom, or on whose behalf, the money was paid, or to his attorney, unless the Court shall think fit to dispense with such notice.

To be on notice.

8. Unless otherwise ordered, whenever any notice, or order, is served under the Act, or under these rules, an affidavit, or affirmation, in proof of such service, shall be filed as soon as possible thereafter.

Affidavit of service of notice, or order.

9. Where it shall appear that previous to any payment into Court under section 83 or any subsequent section, a sufficient tender was made to, and refused

Costs of mortgagee.

Disallowances where tender refused.

by, the mortgagee, he shall not be allowed to obtain payment of the amount deposited in Court to meet his claim, without deduction of the fees and charges of the Accountant General and the Bank, nor shall he be allowed his costs of obtaining such payment. Except as aforesaid, or when otherwise ordered, the mortgagee shall be allowed all costs properly incurred by him.

10. If through default on the part of the plaintiff it becomes necessary to obtain an enlargement of time under section 87, no interest shall be allowed for the enlarged time.
- When interest disallowed.

11. On an application for payment of money out of Court, under section 83 or any subsequent section, by a mortgagee, who has complied with the orders of the Court and the provisions of the Act and of these rules, so far as they relate to him, or apply to his case and has, when required so to do, transferred the property and possession, free from encumbrance, and caused such transfer to be registered, and accounted for the documents of title which were held by him, the Court shall make such order or orders as to it shall seem fit for the disposal of the capital sum and interest thereon, and of the fund for costs and expenses.
- Order for payment of money out of Court, under s. 83, or any subsequent section.

12. Every decree for sale under the Act shall direct that, if the proceeds of sale shall not be sufficient to satisfy the decree, the defendant [if the original mortgagor] shall personally [or if the representative in estate of the original mortgagor, shall out of his estate] pay the amount of the deficiency.
- Decree for sale to provide for payment of amount of deficiency.

13. Every final order for foreclosure, under section 87 or section 93, shall direct that possession of the property be given to the mortgagee, except where he is already in possession. It shall also, at the option of the mortgagee, be drawn up with a recital of the decree and the proceedings had thereunder, and with a full description of the property, or without any such recital or description.
- Final foreclosure order, s. 87 or s. 93.

14. Where immoveable property is sold under section 88, or any subsequent section, the purchaser may, on application to a Judge in Chambers, obtain a certificate of sale as evidence of the title to the property sold to him, and may also, at his own costs, obtain a conveyance from the mortgagor.

15. Every enforceable order made under section 83 may be enforced under the provisions of the Code of Civil Procedure, and shall for that purpose be deemed to have been made in a suit instituted under that Code.

16. Rules 45 and 46 of the rules of the 1st of August 1877 [Rules 431 and 432, Belchambers R. and O., pp. 200, 201], relating to sale by the Registrar are hereby repealed.

From rule 50 of the same rules shall be omitted the words "unless otherwise ordered the costs of such application in the case of a person under disability shall be part of the costs of the sale, and in other cases shall be borne and paid by the defaulting party."

At the end of rule 58 of the same rules shall be added the words "or the grant to him of a certificate of sale."

17. Rules 387 to 449 [Belchambers R. and O., pp. 189 to 205] relating to sales by the Registrar as modified by the last preceding rule, and so far as they are applicable shall apply to all sales by the Court under sections 88 and 89 or 92 and 93.

18. The money rules 597a to 641 [Belchambers R. and O., pp. 240 to 253] shall also, so far as they are applicable, apply to the payment of money into Court, and out of Court, under these rules.

19. The form set forth in the annexed schedule shall be followed, with such variations as the circumstances of each case may require.

## NOTICE UNDER SECTION 83.

IN THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL,  
ORDINARY ORIGINAL CIVIL JURISDICTION.

To B.

WHEREAS A has, under section 83 of Act IV of 1882, deposited in Court Rs. 10,000 as the amount remaining due on the mortgage to you, dated the            day of            188 , and Rs 100 for the commission and charges of the Accountant-General and the Bank of Bengal, and Rs. 500 to provide for such necessary costs and expenses as you may incur [and whereas it is alleged that a sufficient tender was previously made to you] :—You are hereby informed that the Court, upon being satisfied that you have retransferred the property comprised in the said mortgage and [where B is in possession] delivered up possession thereof to the said A, and have also delivered up to the said A, or deposited in Court, or accounted for, all documents in your possession or power, or for which you are responsible, relating to the said property, the Court will make such order as to it shall seem fit for the payment to you of the said sum of Rs. 10,000 [less, where a tender was made, the commission and charges of the Accountant-General and the Bank of Bengal] with all costs and expenses to which you may be entitled.

*Dated this            day of*

*188 .*

*Registrar.*



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